C. 2

Periodical Collection

Indiana Law Review

VOLUME 15 • 1982 • NUMBER 1

1981 Survey of Recent Developments in Indiana Law

I. **Administrative Law**—*Wayne K. Lewis*
II. **Business Associations**—*Paul J. Galanti*
III. **Civil Procedure and Jurisdiction**—*William F. Harvey*
IV. **Commercial Law**—*Gerald L. Bepko*
V. **Constitutional Law**—*R. Matthew Neff*
VI. **Criminal Law and Procedure**—*Lynne D. Lidke*
VII. **Decedents' Estates and Trusts**—*Debra A. Falender*
VIII. **Domestic Relations**—*Pamela Rhine & Anne H. Weinheimer*
IX. **Evidence**—*Henry C. Karlson*
X. **Insurance**—*G. Kent Frandsen*
XI. **Labor Law**—*Edward P. Archer*
XII. **Products Liability**—*John Vargo*
XIII. **Professional Responsibility**—*David A. Funk*
XIV. **Property**—*N. Kent Smith & Mark R. Wenzel*
XV. **Secured Transactions and Creditors' Rights**—*R. Bruce Townsend*
XVI. **Taxation**—*J.B. King*
XVII. **Tort Law**—*Daniel J. Harrigan*
XVIII. **Workers' Compensation**—*Jordan H. Leibman*

Registered Professional Reporters

JOHN E. CONNOR & Associates

(317) 632-5533

204 UNION FEDERAL BUILDING

Indianapolis, Ind. 46204

Reference: MARTINDALE-HUBBELL

INDIANA LAW REVIEW

We are pleased to announce that Volume 15, Number 2 will feature a Symposium on:

SECURED CREDITORS' RIGHTS IN BANKRUPTCY

Subscription Rates: one year, $15.00; foreign, $18.50; student, $13.00

PUBLISHED FOUR TIMES YEARLY

Send Orders to: Business Manager
Indiana Law Review
Indiana University School of Law, Indianapolis
735 W. New York Street, Indianapolis, Indiana 46202

Indiana Law Review

Volume 15 | 1982 | Number 1

Copyright © 1982 by the Trustees of Indiana University

1981 Survey of Recent Developments in Indiana Law

Table of Cases ix

I. Administrative Law ..... *Wayne K. Lewis* 1
- *A. Procedural Due Process* 1
- *B. Scope of Judicial Review* 11
- *C. The Requirement of Findings* 15
- *D. Reviewability of Agency Decisions* 22
- *E. Exhaustion* 23
- *F. Timely Appeals* 25

II. Business Associations ..... *Paul J. Galanti* 31
- *A. In Pari Delicto Defense* 31
- *B. Securities Fraud* 34
- *C. Indiana Business Takeover Act* 39
- *D. Definition of Security* 47
- *E. Rights and Liability of a Promoter* 51
- *F. Retaliatory Discharge* 54
- *G. Intercorporate Relations* 57
- *H. Statutory Developments* 58

III. Civil Procedure and Jurisdiction ..... *William F. Harvey* 69
- *A. Introduction* 69
- *B. Jurisdiction, Process, Venue, Standing and Claims in General* 69
- *C. The 1981 Original Action Rule* 77
- *D. Pleadings and Pre-Trial Motions* 80
- *E. Parties and Discovery* 83
- *F. Trial and Judgments* 95
- *G. Appeals* 99

IV. Commercial Law ..... *Gerald L. Bepko* 109
- *A. Dishonored Checks* 109
- *B. Treble Damages and Deceptive Advertising* 112
- *C. Banks as Holders In Due Course* 114

Volume 15 | Winter 1982 | Number 1

The INDIANA LAW REVIEW (ISSN 0090-4198) is the property of Indiana University and is published four times yearly, January, March, April, and June, by the Indiana University School of Law — Indianapolis, which assumes complete editorial responsibility therefor. Subscription rates: one year $15.00; foreign $18.50. Single copies: annual Survey issue, $9.00; other issues, $4.50. Back issues, volume 1 through volume 13, are available from Fred B. Rothman & Co., 10368 W. Centennial Rd., Littleton, Co. 80123. Please notify us one month in advance of any change of address and include both old and new addresses with zip codes to ensure delivery of all issues. Send all correspondence to Editorial Assistant, Indiana Law Review, Indiana University School of Law — Indianapolis, 735 West New York Street, Indianapolis, Indiana 46202. Publication office: 735 West New York Street, Indianapolis, Indiana 46202. Second class postage paid at Indianapolis, Indiana 46201.

D. *Implied Warranties by Non-Merchants* 115
E. *Privity Requirements* 116
F. *Express Warranties* 118
G. *Statute of Limitations: Sales of Goods* 121
H. *Warranty by Endorsement* 122

V. Constitutional Law ..... *R. Matthew Neff* 125
A. *Introduction* 125
B. *Due Process of Law* 125
C. *Equal Protection of the Law* 136
D. *Specific Constitutional Rights and Duties* 142
E. *Conclusion* 157

VI. Criminal Law and Procedure ..... *Lynne D. Lidke* 159
A. *Death Penalty* 159
B. *Plea Bargain Agreements and "Shock Probation"* 163
C. "Allen *Charges*" 165
D. *The Insanity Defense and Psychiatric Testimony* 166
E. *Lesser Included Offenses and Double Jeopardy* 167
F. *Collateral Estoppel and the Habitual Offender Law* 171
G. *Standards of Care: Neglect of a Dependent* 172

VII. Decedents' Estates and Trusts ..... *Debra A. Falender* 175
A. *Malpractice Statute of Limitations* 177
B. *Equitable Election* 179
C. *The* Kingseed *Saga: Estate Administration Issues* 180
D. *Other Decedents' Estates Developments* 187
E. *Trust Developments* 198

VIII. Domestic Relations ..... *Pamela Rhine* 203
Anne H. Weinheimer
A. *Adoption* 203
B. *Child Custody* 207
C. *Child Support* 213
D. *Dissolution* 215
E. *Paternity* 222

IX. Evidence ..... *Henry C. Karlson* 227
A. *Hearsay* 227
B. *Best Evidence Rule* 232
C. *Impeachment* 234
D. *Competency* 236
E. *Informant's Privilege* 238
F. *Opening the Door* 240
G. *Opinion Testimony* 242

X. Insurance ..... *G. Kent Frandsen* 247
A. *Exclusions for Intentional Acts* 247
B. *Cumulative Coverage Clauses* 252
C. *Uninsured Motorist Coverage* 257
D. *Omnibus Clause* 260
E. *Insurer's Subrogation Rights Prejudiced* 264
F. *Limitations of Coverage of Comprehensive General Liability Policy* ... 265

XI. Labor Law ..... *Edward P. Archer* 269
A. *Teacher Bargaining* 269
B. *Bargaining for Other Public Employees* 273
C. *Arbitration Appeals* 280

D. *Unemployment Compensation* 285
E. *Strike Injunction Enforcement* 287

XII. Products Liability ..... *John Vargo* 289
A. *Introduction* 289
B. *The* Dague *Case* 290
C. *Defenses and Bars to Recovery* 293
D. *Foreseeability and Component Parts* 296
E. *Failure to Warn* 299
F. *Distinctions Among Theories* 302
G. *Conclusion* 303

XIII. Professional Responsibility ..... *David A. Funk* 305
A. *Introduction* 305
B. *"Statutory" Developments* 306
C. *Indiana Court Cases* 307
D. *Federal Cases* 313
E. *Ethics Committee Opinions* 315
F. *Indiana Supreme Court Disciplinary Commission* 315
G. *Conclusion* 316

XIV. Property ..... *N. Kent Smith* 319
Mark R. Wenzel
A. *Bailments* 320
B. *Easements and Restrictive Covenants* 322
C. *Joint Ownership* 325
D. *Landlord and Tenant Relations* 328
E. *Land Ownership in General* 341
F. *Lateral and Subjacent Support* 343
G. *Water Law* 346
H. *Real Estate Transactions* 351

XV. Secured Transactions and Creditors' Rights ..... *R. Bruce Townsend* 367
A. *Secured Transactions* 368
B. *Creditors' Rights* 389
C. *Miscellaneous Cases and Legislation* 405

XVI. Taxation ..... *J.B. King* 409
A. *Introduction* 409
B. *The Supreme Court's* Kimberly-Clark *Decision* 410
C. Calcar v. Cave Stone—*A Continuing Sales Tax Dilemma* 413
D. *The 1980-1981 Gross Income Tax Decisions* 415
E. *The Tax Situs of Intangibles*—Mercantile Mortgage 419
F. *Judicial Review of State Tax Board Assessments*—Uhlir v. Ritz *Revisited* 421
G. *Some Inheritance Tax Decisions* 422
H. *1981 Tax Legislation* 423

XVII. Torts ..... *Daniel J. Harrigan* 425
A. *Introduction* 425
B. *Medical Malpractice* 425
C. *Attorney Malpractice* 432
D. *Director Misconduct* 433
E. *Landowners, Farm Animals and Duty Issues* 433
F. *Landlord and Tenant* 435
G. *Premises Liability and Landlord Invitees* 436
H. *Vendor-Purchaser and Unknown Defects* 437
I. *Slander of Title and Punitive Damages* 437

J. Duty, Discretionary Functions, and the Tort Claims Act 438
K. School Officials 442
L. Defamation 443
M. Retaliatory Discharge 446
N. Personal Service Contracts and Punitive Damages 447
O. Explosives, Proximate Cause, and Damages 448
P. Wrongful Death 449

XVIII. Workers' Compensation ..... *Jordan H. Leibman* 453
A. Permanent Total Disability 453
B. Exclusiveness of Remedy 458
C. Progressive and Recurrent Injuries 470
D. Arising Out Of and In The Course of Employment 473
E. Statutory Discrepancy in Benefit Schedules 474
F. Statutory Development 475

TABLE OF CASES

A

Aaron v. Review Board of Indiana Employment Security Division, 13
Abell v. Clark County Department of Public Welfare, 74
Adams v. Luros, 80, 430
Addison v. Review Board of Indiana Employment Security Division, 10
American Automobile Insurance Co. v. Spieker, 265
American Fletcher Mortgage Co. v. U.S. Steel Credit Corp., 47
American Leasing, Inc. v. Maple, 110
Amermac, Inc. v. Gordon, 291
Anderson Federation of Teachers v. Alexander, 269
Andrus v. P-Burg Coal Co., 145
Argyelan v. Haviland, 346
Arnold v. Dirrim, 38
Atkinson v. City of Marion, 136
Atwood v. Davis, 429

B

Bailey v. State, 133
Baker v. Chambers, 368, 369
Ball Stores, Inc. v. State Board of Tax Commissioners, 75
Baumholser v. Amax Coal Co., 449
Bemis Co. v. Rubush, 302
Berman v. City Products Corp., 34
Blake v. Dunn Farms, Inc., 341, 342, 343, 433
Board of Commissioners v. Joeckel, 324
Board of Regents v. Roth, 131
Bogdon v. Ramada Inn, Inc., 470
Boland v. Greer, 449
Bolen v. Mid-Continent Refrigerator Co., 376, 378
Bottoms v. B & M Coal Corp., 98, 287
Bowen v. Sonnenburg, 23, 84
Bowling v. Holdeman, 92
Brames v. State, 148
Breezewood Management Co. v. Maltbie, 329, 330, 331
Brewer v. Brewer, 83
Brewer v. State, 161
Bridges v. Kentucky Stone Co., 448
Briggs & Stratton Corp. v. Commission, 411
Brown v. Union Oil Co., 92
Budnick v. Budnick, 396
Bunker v. National Gypsum Co., 466
Burd v. Sussex Mutual Insurance Co., 251
Burks v. Bolerjack, 442
Burnett v. State, 165
Burton v. L.O. Smith Foundry Products Co., 299

C

California v. Green, 229
Campbell v. Eli Lilly & Co., 54, 446
Candlelight Homes, Inc. v. Zornes, 117
Cargill, Inc. v. Perlich, 375
Carrow v. Streeter, 430
Carter v. State, 227
Chauffeurs, Teamsters, Warehousmen and Helpers Local 135 v. Jefferson Trucking Co., 283
Chavis v. Rowe, 151
Cherry v. State, 236
Chrysler Corp. v. Reeves, 94
Citizens Energy Coalition, Inc. v. Sendak, 133
Citizens Energy Coalition, Inc. v. Indiana & Michigan Electric Company, 11
Citizens National Bank v. Stasell, 179, 180
Citizens National Bank v. Harvey, 395
City Investing Co. v. Simcox, 39
City of Evansville v. Miller, 101
City of Hammond v. Red Top Trucking Company, Inc., 126
City of Hammond v. State *ex rel.* Jefferson, 8
City of Indianapolis v. Sherman, 4
City of South Bend v. Brooksfield Farm, 28
Claise v. Bernardi, 382
Clark County State Bank v. Bennett, 97
Clark v. Clark, 397
Clark v. Lee, 137
Colorado River Water Conservation District v. United States, 41
Colton v. Commonwealth of Kentucky, 133
Commission on General Education v. Union Township School of Fulton County, 134
Cook v. Loftus, 187

County Department of Public Welfare v. AFSCME, 273
Craven v. Niagara Machine & Tool Works, Inc., 301
Crestwood Park, Inc. v. Apostal, 406
Criss v. Bitzegaio, 175
Crouch v. Hall, 439
Cua v. Ramos, 443
Cunningham v. Aluminum Co. of America, 458

D

D.H. v. J.H., 210
Dague v. Piper Aircraft Corp., 289, 291
Dan Purvis Drugs, Inc. v. Aetna Life Insurance Co., 31
Davis v. B.C.L. Enterprises, Inc., 403
Deetz v. McGowan, 102
Department of Treasury v. Allied Mills, Inc., 416
Department of Treasury v. International Harvester Co., 416
Diaz v. Duncan, 191
Dodd v. Kiefer, 293
Doe v. Renfrow, 148, 443
Donahue v. Watson, 201, 103
Dorsey v. Dorsey, 213, 225
Dortch v. Lugar, 130
Douglas v. Warner Gear Division of Borg Warner Corp., 473
Duke Power Co. v. Carolina Environmental Study Group, Inc., 139
Duncan v. George Moser Leather Co., 244

E

E.F.P. Corp. v. Pendill, 472
East Chicago Teachers Union Local 511 v. Board of Trustees, 274
Eberbach v. McNabney, 80, 399
Ebersold v. Wise, 371, 373
Elliott v. Roach, 77, 83, 444
Elmore v. State, 170
Eisen IV, Eisen v. Carlisle & Jacquelin, 85
Erdman v. White, 96
Estate of Gillilan v. Estate of Gillilan, 187, 188
Evans v. Huss, 90
Exxon Corporation v. FTC, 149

F

F.J. v. State, 134
Featherston v. Stanton, 8
First Federal Savings & Loan Association v. Arena, 355, 381, 403
Fleetwood Corp. v. Mirich, 433
Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, 135
Foremost Life Insurance Co. v. Department of Insurance, 399
Fort Wayne Patrolman's Benevolent Association, Inc. v. City of Fort Wayne, 275, 277
Forth v. Forth, 200
Foster v. New, 444
Foster v. Review Board of Indiana Employment Security Division, 6, 18, 127
Frampton v. Central Indiana Gas Co., 55, 463
Froberg v. Northern Indiana Construction, Inc., 391

G

Gannett Co. v. DePasquale, 144
Garvey Grain Co. v. Director, Office of Workers' Compensation Programs, 469
Gary Teachers Union Local 4 v. School City of Gary, 274
Gary-Northwest Indiana Women's Services v. Bowen, 156
General Motors Corp. v. Arnett, 81, 389, 451
Gerhardt v. City of Evansville, 2, 129
Gilliam v. State, 241
Glasgo v. Glasgo, 219
Good v. Crowel, 98
Graham v. Starr, 206
Grayned v. Rockford, 135
Great Atlantic & Pacific Tea Co. v. Wilson, 339, 436
Gregg v. Georgia, 160
Gross Income Tax Division v. Owens-Corning Fiberglass Corp., 416
Grueninger Travel Service, Inc. v. Lake County Trust Co., 335, 336

H

Hall v. State, 171
Hanchar Industrial Waste Management, Inc. v. Wayne Reclamation & Recycling, Inc., 93
Harper v. Goodin, 390, 437
Harrington v. State, 234
Harris v. Rainsoft of Allen County, Inc., 473
Haynes v. State, 240
Hedges v. Rawley, 441

Henderlong Lumber Co. v. Zinn, 390
Hensley v. Hensley, 194
Herff Jones Co. v. State Tax Commission, 411
Herman v. Arnold, 204
Hervey v. AMF Beaird, Inc., 411
Heshelman v. Nationwide Mutual Fire Insurance Co., 249
Hewitt v. Hewitt, 220
Hiatt v. Yergin, 96
Hickman v. Taylor, 86
Hidden Valley Lake Property Owners Association v. HVL Utilities, 19
Hills v. Area Plan Commission, 16
Hinds v. McNair, 198
Hockelberg v. Farm Bureau Insurance Co., 264
Hodel v. Indiana, 155
Holdbrook v. Pitt, 132
Home Insurance Co. v. Neilsen, 248
Home Mutual Insurance Co. v. Automobile Underwriters, Inc., 262
Hornbrook-Price Co. v. Stewart, 472
Huggins v. State, 308

I

In re Bruce E. Bloom, 309
In re C. Keith Pettigrew
In re City Investing Co., 43, 67
In re Estate of Baird, 192, 194
In re Estate of Compton, 423
In re Estate of Garwood, 195
In re Estate of Jackson, 97
In re Estate of Kingseed, 181-186, 400
In re Estate of Newell, 422
In re Estate of Sandefur, 192
In re Estate of Wisely, 422
In re George A. Purvis, 309
In re Hugh V. Banta, 308
In re John M. Rhame III, 308
In re Joseph, 211
In re Leckrone, 206
In re Lemond, 207
In re M. Daniel Friedland, 309, 310
In re Marriage of Dreflak, 216, 217
In re Miedl, 204
In re Preston M. Thomas, 311
In re Snyder, 90
In re William R. McCain, 310, 311
Indiana Alcoholic Beverage Commission v. Gault, 4, 131
Indiana Bankers Association v. First Federal Savings & Loan Association, 85
Indiana Department of Public Welfare v. Rynard, 102
Indiana Department of Revenue v. Kimberly-Clark Corp., 409, 411
Indiana Department of State Revenue v. American Dairy of Evansville, 415
Indiana Department of State Revenue v. Cave Stone, Inc., 413
Indiana Department of State Revenue v. Commercial Towel & Uniform Serv., 418
Indiana Department of State Revenue v. Continental Steel Corp., 412
Indiana Department of State Revenue v. Convenient Industries of America, 417
Indiana Department of State Revenue v. Lyall Electric, Inc., 419
Indiana Department of State Revenue v. Marsh Supermarkets, Inc., 417
Indiana Department of State Revenue v. Mercantile Mortgage Co., 409, 419, 420
Indiana Department of State Revenue v. RCA Corp., 414
Indiana Education Employment Relations Bd. v. Benton Community School, 273
Indiana Farmers Mutual Insurance Co. v. Speer, 257
Indiana Insurance Co. v. American Underwriters, Inc., 253
Indiana Insurance Co. v. DeZutti, 265
Indiana Insurance Co. v. Federated Mutual Insurance Co., 253
Indiana Insurance Co. v. Pettigrew, 69
Indiana Lumbermen's Mutual Insurance Co. v. Brandum, 247
Indiana State Board of Embalmers & Funeral Directors v. Keller, 18
Indiana State Department of Welfare, Medicaid Division v. Stagner, 24
Indiana State Highway Commission v. Rickert, 438
Indiana University v. Indiana Bonding & Surety Company, 403
Indianapolis Public Transit Corp. v. Transit Local 1070, 284
Industrial Disposal Corp. v. City of East Chicago, 325, 369
Irwin v. Irwin, 217

J

Jackson v. Gibson, 462
Jackson v. Review Board, 287
Jackson v. State, 232
Jaymar-Ruby, Inc. v. FTC, 22, 149
Johnson v. Capps, 206
Johnson v. Robinson, 139
Johnson v. Ross, 213

Johnson v. St. Vincent Hospital, Inc., 135 138, 425
Jones v. Review Board of the Indiana Employment Security Division, 18
Jones v. State, 312
Judy v. State, 159

K

Keiling v. McIntire, 72
Kelsey v. Nagy, 34
Key v. Sneed, 190, 400
Kincaid v. Lazar, 57
King Pin Motor Lodge, Inc. v. D.J. Construction Co., 394
Kiyose v. Trustees of Indiana University, 49
Kottis v. United States Steel Corp., 462
Krieg v. Glassburn, 212
Krueger v. Bailey, 95
Kuchler v. Mark II Homeowners Association, Inc., 322, 369

L

Lafayette Tennis Club, Inc. v. C.W. Ellison Builders, Inc., 394
Lane v. Barringer, 294
Lantis v. Astec Industries, Inc., 298
Lawrence County Commissioners v. Chorley, 242
Lee v. Weston, 242
Leon-Roche v. Review Board of the Indiana Employment Security Division, 7
Lewis v. State, 165, 166
Lincoln Nebraska Bank v. Herber, 51
Lockett v. Ohio, 162
Lukowski v. Vecta Education Corp., 298
Lustic v. Hall, 449

M

Maher v. Gagne, 72
Mailand v. Burckle, 33
Maine v. Thiboutot, 72
Manning v. Allgood, 92
Marcovich Land Corp. v. J.J. Newberry Co., 340
Marich v. Kragulac, 142, 143
Marotta v. Iroquois Realty Co., 366
Martin v. Platt, 55
Martincich v. City of Hammond, 150
Martinez v. California, 72
Marvin v. Marvin, 219
Masson Cheese Corp. v. Valley Lea Dairies, Inc., 377
Mathews v. Eldridge, 5
McCall v. State, 166, 242
McCormick Piano and Organ Co. v. Geiger, 112
McDonnell v. Flaharty, 450
McGairk v. State, 168
McMahon Food Co. v. Call, 110
Melnik v. Melnik, 216
Michelson v. United States, 241
Mid-America Marketing v. Falender Development Corp., 350, 351
Midway Ford Truck Center, Inc. v. Gilmore, 81, 302
Midwest Mutual Insurance Co. v. Indiana Insurance Co., 256
Miles Homes of Indiana, Inc. v. Harrah Plumbing & Heating, 371, 392, 393
Miles Laboratories, Inc. v. Department of Revenue, 411
Mills v. American Playground Device Co., 80
Mite Corp. v. Dixon, 39
Modlin v. Paulson, 76
Moore v. Barrett Co., 32
Morris v. State, 307
Mother Goose Nursery Schools v. Sendak, 132
Mueller Brass Co. v. Gross Income Tax Division, 416
Mullane v. Central Hanover Bank & Trust Co., 126, 133
Murphy v. State, 168

N

Nate v. Galloway, 332
National League of Cities v. Usery, 153, 156
Neal v. Neal, 219
Needham v. Fred's Frozen Foods, Inc., 462
Needham v. Needham, 211
Nelson v. O'Neil, 229, 230
Nimel Industries, Inc. v. Joy Manufacturing Co., 320, 321
North v. Newlin, 370
Northeast Marine Terminal Co. v. Caputo, 469
Nova Records, Inc., v. Sendak, 134

O

O'Donaghue v. Review Board of the Indiana Employment Security Division, 27
Office of the Public Counselor v. Indianapolis Power & Light Co., 15
Orto v. Jackson, 353

P

Pain v. Packard, 404
Palmer v. State, 312
Pardue v. Seven-Up Bottling Co. of Indiana, 295
Parrett v. Lebamoff, 450
Pearson v. First National Bank, 356, 387
Pennycuff v. Fetter, 352, 437
Perez v. United States Steel Corp., 20, 453
Perma Life Mufflers, Inc. v. International Parts Corp., 32
Peterson v. Culver Educational Foundation, 447
Pillars v. State, 170
Piskorowski v. Shell Oil Co., 83
Piwowar v. Washington Lumber & Coal Co., 77
Powers v. Ford, 372
Presbyterian Church v. Hall Church, 142
Profitt v. Florida, 160
Purcell v. English, 435

R

Railroad Commission v. Pullman, 40
Ralston v. State, 99
Reed v. Reed, 139
Rees v. Heyser, 82
Reliance Insurance Co. v. Al E. & C. Ltd., 299
Rhodes v. Chapman, 151, 152
Riner v. Raines, 128
Riverside Insurance Company of America v. Smith, 261
Roadway Express, Inc. v. Piper, 94, 314
Roberts v. Casting Service Corp., 474
Roberts v. Wabash Life Insurance Co., 196
Robertson v. Mattingly, 389
Roe v. Wade, 156, 157
Rohn v. Thuma, 213, 396
Rohrabaugh v. Wagoner, 138, 431
Ross v. Heyne, 314
Ross v. Tavel, 57
Rossow v. Jones, 435
Royal Business Machines, Inc. v. Lorraine Corp., 118
Rufer v. State, 308
Russell v. Review Board of the Indiana Employment Security Division, 12

S

S & F Supply Co. v. Hunter, 37
Sanders v. Kerwin, 73
Sandlin v. Review Board of the Indina Employment Security Division, 5, 127
Sandock v. Taylor Construction Corp., 102
Sandoval v. Hammersly, 223
Schenkel v. Allen County Plan Commission, 16
Scherer v. Scherer, 218
Schleiffer v. Meyers, 209
Schoolcraft v. Ross, 357
Scott v. Union Tank Car Co., 447, 464
Shane Quadri v. Goodyear Service Stores, 404
Shanks v. A.F.E. Industries, Inc., 296, 297
Sherbert v. Verner, 285
Shideler v. Dwyer, 177, 432
Short v. Texaco, Inc., 133
Sidle v. Majors, 139
Sigsbee v. Swathwood, 333
Silva v. State, 238
Siskind v. Siskind, 395, 396
Skendzel v. Marshall, 367, 372
Slebodnik v. City of Indianapolis, 125
Smith v. State, 172
Snodgrass v. Baize, 250, 398
Snyder v. Shelby County Department of Public Welfare, 203
Snyder v. Tell City Clinic, 97
Solar Sources v. Air Pollution Control Board, 27, 74
South Bend Osteopathic Hospital, Inc. v. Phillips, 432
Southern, School Buildings, Inc. v. Loew Electric, Inc., 390
Spall v. Janota, 344, 345
Speiser v. Addis, 338
Spencer v. Glover, 321, 322
St. Paul Fire & Marine Insurance Co. v. State Bank of Salem, 114
Stanley v. Kelley, 100
Stanton v. Godfrey, 71
State Board of Tax Commissioners v. Gatling Gun Club, Inc., 410, 421
State Department of Administration v. Sightes, 282
State Department of Revenue v. Calcar Quarries, Inc., 413
State *ex rel.* Dunlap v. Cross, 1, 129
State *ex rel.* Goldsmith v. Marion County Superior Court, 163
State *ex rel.* Long v. Marion County Superior Court, 71
State *ex rel.* Newton v. Board of School Trustees, 15
State *ex rel.* Shaunki v. Endsley, 219
State *ex rel.* The Post-Tribune Publishing Co. v. Porter Superior Court, 143
State of Indiana v. Andrus, 152

State v. Kuespert, 93
State v. Mason, 348
State v. Normandy Farms, 97
State v. Tharp, 169
State, Indiana State Highway Commission v. Speidel, 82
Steup v. Indiana Housing Finance Authority, 137
Stokely-Van Camp, Inc. v. State Board of Tax Commissioners, 422
Stoneburner v. Fletcher, 360, 361
Stotts v. State, 133
Stumler v. Ferry-Morse Seed Co., 121
Suburban Electric Co. v. Lake County Trust Co., 391
Sui Yee Lee v. Lafayette Home Hospital, Inc., 429
Summerlot v. Summerlot, 195, 399
Sutton v. Roth, Wehrly, Heiny, Inc., 366

T

Taber v. Hutson, 110
Talas v. Correct Piping Co., 11, 455
Tauteris v. Review Board of Indiana Security Division, 10
Temple v. Temple, 216
Theobald v. Chumley, 359
Thomas v. Review Board, 285
Thompson v. Lee, 434
Tipton County Abstract Co. v. Heritage Federal Savings & Loan, 363
Toller v. Toller, 225
Tucker v. Marion County Department of Public Welfare, 126

U

U.S. Aircraft Financing, Inc. v. Jankovich, 371, 383
Uhlir v. Ritz, 421
United Farm Bureau Mutual Insurance Co. v. Wampler, 398
United Services Automobile Association v. American Interinsurance Exchange, 255
United States Housing Foundation v. Forman, 50
United States Steel Corp. v. Dykes, 473
United States of America v. Board of School Commissioners, 139, 140
United States v. Harris, 235
United States v. Sims, 245
Universal Camera v. NLRB, 12
Upjohn Co. v. United States, 86, 313

V

Van Bibber v. Norris, 367, 379, 383, 384, 386
Vetor v. Shockey, 115, 351

W

Wagner v. Kendall, 281
Wagoner Construction Co. v. Noonan, 354
Wakschlag v. Review Board of Indiana Employment Security Division, 11
Walker v. Review Board of Indiana Employment, 6
Walton v. Ramp, 440
Warner Press, Inc. v. Review Board, 286
Warram v. Stanton, 26
Warren v. Indiana Telephone, 2, 130
Washington County Department of Public Welfare v. Konar, 205
Watt v. State, 230
Weedo v. Stone-E-Brick, Inc., 267
Welborn v. Society for Propagation of Faith, 331
Whispering Pines Home for Senior Citizens v. Nicalek, 21
White Truck Sales, Inc. v. Shelby National Bank, 122
Whitman v. Whitman, 210, 215
Wienke v. Lynch, 325, 368
William S. Deckelbaum Co. v. Equitable Life Assurance Society, 365
Williams v. State, 173
Wilson v. Health and Hospital Corp., 146
Wilson v. Review Board of the Indiana Employment Security Division, 25
Wilson v. Wilson, 216, 397
Witherspoon v. Salm, 462
Wood v. Strickland, 149, 442
Wright v. Doe d. Tatham, 231

Y

Young v. Taylor, 39

Z

Zurich General Accident & Liability Insurance Co. v. Clamor, 252

Indiana Law Review

Volume 15 1981

R. GEORGE WRIGHT
Editor-in-Chief

JUDITH A. STEWART
Executive Editor

S. ANDREW BOWMAN
CATHERINE CHAMBERS
WILLIAM M. THOMPSON
MERLIN P. WHITEMAN
Articles Editors

WILLIAM J. HANCOCK
JOAN M. SAYLOR
Managing Editors

MICHAEL J. GRISHAM
LYNNE D. LIDKE
ALAN K. MILLS
DAVID W. STEED
RAYMOND R. STOMMEL, JR.
SUSAN P. STUART
ANNE H. WEINHEIMER
Note and Development Editors

MARK AHEARN
BARRY BELDIN
MARK BOYLL
CHERYL DANBERRY
JAMES DEAL
PAUL GERHARDT
THOMAS GRABB
VICTOR INDIANO
JAY KENNEDY
SHARON MURPHY
JOHN POLIVICK
PAMELA RHINE
JOHN SCHNEIDER
CAROL SHOSID
LANA SWINGLER
JOHN CHRISTOPHER WALL
ARDETH WILSON
TERRANCE WOOLSTON
GERALD WUNSCH
BETH YOUNG
Associate Editors

PAUL J. GALANTI
Faculty Advisor

GWEN I. WILSON
Editorial Assistant

Indiana University School of Law—Indianapolis

1981-1982 ADMINISTRATIVE OFFICERS AND FACULTY

Administrative Officers

JOHN W. RYAN, *Ph.D., President of the University*
GLENN W. IRWIN, JR., *M.D., Vice-President*
GERALD L. BEPKO, *LL.M., Acting Dean*
G. KENT FRANDSEN, *J.D., Associate Dean for Student Affairs*
JEFFREY W. GROVE, *J.D., Acting Associate Dean for Academic Affairs*

Faculty

THOMAS B. ALLINGTON, *Professor. B.S., University of Nebraska, 1964; J.D., 1966; LL.M., New York University, 1971.*

EDWARD P. ARCHER, *Professor. B.M.E., Rensselaer Polytechnic Institute, 1958; J.D., Georgetown University, 1962; LL.M., 1964.*

JAMES F. BAILEY, III., *Associate Professor and Director of Law Library. A.B., University of Michigan, 1961; J.D., 1964; M.A.L.S., 1970.*

GERALD L. BEPKO, *Acting Dean and Professor. B.S., Northern Illinois University, 1962; J.D., IIT/Chicago-Kent College of Law, 1965; LL.M., Yale University 1972.*

CLYDE HARRISON CROCKETT, *Professor. A.B., University of Texas, 1962; J.D., 1965; LL.M., University of London (The London School of Economics and Political Science), 1972.*

DEBRA A. FALENDER, *Associate Professor. A.B., Mount Holyoke College, 1970; J.D., Indiana University, 1975.*

G. KENT FRANDSEN, *Associate Dean for Student Affairs and Associate Professor. B.S., Bradley University, 1950; J.D., Indiana University, 1965.*

DAVID A. FUNK, *Professor. A.B., College of Wooster, 1949; J.D., Case Western Reserve University, 1951; M.A., The Ohio State University, 1968; LL.M., Case Western Reserve University, 1972; LL.M., Columbia University, 1973.*

PAUL J. GALANTI, *Professor. A.B., Bowdoin College, 1960; J.D., University of Chicago, 1963.*

HELEN P. GARFIELD, *Professor (on leave first semester, 1981-82). B.S.J., Northwestern University, 1945; J.D., University of Colorado, 1967.*

HAROLD GREENBERG, *Associate Professor. A.B., Temple University, 1959; J.D., University of Pennsylvania, 1962.*

JEFFREY W. GROVE, *Acting Associate Dean for Academic Affairs and Professor. A.B., Juniata College, 1965; J.D., George Washington University, 1969.*

WILLIAM F. HARVEY, *Carl M. Gray Professor of Law. A.B., University of Missouri, 1954; J.D., Georgetown University, 1959; LL.M., 1961.*

W. WILLIAM HODES, *Assistant Professor. A.B., Harvard College, 1966; J.D., Rutgers, Newark, 1969.*

LAWRENCE A. JEGEN, III., *Professor. A.B., Beloit College, 1956; J.D., The University of Michigan, 1959; M.B.A., 1960; LL.M., New York University, 1963.*

HENRY C. KARLSON, *Associate Professor. A.B., University of Illinois, 1965; J.D., 1968; LL.M., 1977.*

WILLIAM ANDREW KERR, *Professor (on leave, 1981-82). A.B., West Virginia University, 1955; J.D., 1957; LL.M., Harvard University, 1958; B.D., Duke University, 1968.*

WALTER W. KRIEGER, *Associate Professor. A.B., Bellarmine College, 1959; J.D., University of Louisville, 1962; LL.M., George Washington University, 1969.*

DAVID P. LEONARD, *Assistant Professor. B.A., University of California at San Diego, 1974; J.D., UCLA School of Law, 1977.*

WAYNE K. LEWIS, *Assistant Professor. B.A., Rutgers University, 1970; J.D., Cornell Law School, 1973.*

WILLIAM E. MARSH, *Associate Professor. B.S., University of Nebraska, 1965; J.D., 1968.*

SUSANAH M. MEAD, *Assistant Professor. B.A., Smith College, 1969; J.D., Indiana University, 1976.*

MARY H. MITCHELL, *Assistant Professor. A.B., Butler University, 1975; J.D., Cornell Law School, 1978.*

RITA M. NOVAK, *Assistant Professor. B.A., Albion College, 1972; J.D., De Paul University, 1978; LL.M., Columbia University, 1981.*

MELVIN C. POLAND, *Professor. B.S., Kansas State University, 1940; LL.B., Washburn University, 1949; LL.M., The University of Michigan, 1950.*

RONALD W. POLSTON, *Professor. B.S., Eastern Illinois University, 1953; LL.B., University of Illinois, 1958.*

GARY A. RATNER, *Associate Professor. B.S., California Institute of Technology, 1966; M.S., Purdue University, 1969; J.D., University of Connecticut, 1973, LL.M., Yale University, 1974.*

BRYAN M. SCHNEIDER, *Assistant Professor. B.A., Amherst College, 1973; J.D., University of South Carolina School of Law, 1976; LL.M., Yale Law School, 1980.*

MARSHALL J. SEIDMAN, *Professor (on leave, 1981-82). B.S., University of Pennsylvania, 1947; J.D., Harvard University, 1950; LL.M., 1970.*

KENNETH M. STROUD, *Professor. A.B., Indiana University, 1958; J.D., 1961.*

BRADLEY J. TOBEN, *Assistant Professor. B.A., University of Missouri, 1974; J.D., Baylor University School of Law, 1977; LL.M., Harvard Law School 1981.*

R. BRUCE TOWNSEND, *Cleon H. Foust Professor of Law. A.B., Coe College, 1938; J.D., University of Iowa, 1940.*

JAMES PATRICK WHITE, *Professor (on special assignment). A.B., University of Iowa, 1953; J.D., 1956; LL.M., George Washington University, 1959.*

LAWRENCE P. WILKINS, *Associate Professor. B.A., The Ohio State University, 1968; J.D., Capital University Law School, 1973; LL.M., University of Texas School of Law, 1974.*

HAROLD R. WOODARD, *Professorial Lecturer. B.S., Harvard University, 1933; J.D., 1936.*

WILLIAM J. WOODWARD, *Assistant Professor. B.A., University of Pennsylvania, 1968; J.D., Rutgers-Camden, 1975.*

Emeriti

AGNES P. BARRETT, *Associate Professor Emeritus. B.S., Indiana University, 1942; J.D., 1964.*

CLEON H. FOUST, *Professor Emeritus. A.B., Wabash College, 1928; J.D., University of Arizona, 1933.*

JOHN S. GRIMES, *Professor Jurisprudence Emeritus. A.B., Indiana University, 1929; J.D., 1931.*

Legal Writing Instructors

PATRICIA SEASOR BAILEY, *Lecturer. B.A., Anderson College, 1978; J.D., Indiana University, 1981.*

CLARK ROBINSON, *Lecturer. A.B., Earlham College, 1966; M.A., Southern Illinois University-Carbondale, 1968; J.D., Indiana University, 1981.*

JOAN RUHTENBERG, *Lecturer. B.A., Mississippi University for Women, 1959; J.D., Indiana University, 1980.*

Law Library Staff

WENDELL E. JOHNTING, *Technical Services Librarian. A.B., Taylor University, 1974; M.L.S., Indiana University, 1975.*

LAURA KIMBERLY, *Acquisitions/Serials Librarian. B.A., Florida State University, 1977; M.S., 1980.*

CHRISTINE L. STEVENS, *Reference Librarian. A.B., Western Michigan University, 1970; M.L.S., Indiana University, 1971.*

KATHY J. WELKER, *Assistant Director. A.B., Huntington College, 1969; M.L.S., Indiana University, 1972.*

MERLIN P. WHITEMAN, *Reader's Service Librarian. A.B., Hope College, 1973; M.L.S., Indiana University, 1974.*

Indiana Law Review

Volume 15 1982 Number 1

Survey of Recent Developments in Indiana Law

The Board of Editors of the *Indiana Law Review* is pleased to publish its seventh annual Survey of Recent Developments in Indiana Law. This survey covers the period from June 1, 1980, through May 31, 1981. It combines a scholarly and practical approach in emphasizing recent developments in Indiana case and statutory law. Selected federal case and statutory developments are also included. No attempt has been made to include all developments arising during the survey period or to analyze exhaustively those developments that are included.

I. Administrative Law

WAYNE K. LEWIS*

A. *Procedural Due Process*

1. Applicability of Due Process to Administrative Hearings.—The fourteenth amendment to the U.S. Constitution provides that "no state shall . . . deprive any person of life, liberty, or property, without due process of law."[1] A conflict arose in the Indiana Courts of Appeal beginning with *State ex rel. Dunlap v. Cross*[2] as to whether the suspension of a police officer for ten days or less constitutes the deprivation of a property interest which would entitle the officer to constitutional due process protections.

La Verne Dunlap, a Michigan City police officer, sought judicial review of a decision of the Police Civil Service Commission which suspended her from the police force for ten working days without pay. The third district court of appeals, after determining that she did not have a statutory right to judicial review under the Tenure

*Assistant Professor of Law, Indiana University School of Law, Indianapolis. B.A., Rutgers University, 1970; J.D., Cornell Law School, 1973.

[1]U.S. CONST. amend. XIV, § 1.

[2]403 N.E.2d 885 (Ind. Ct. App. 1980). *See* Greenberg, *Administrative Law, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 65, 82-84 (1981).

Act in effect at that time,[3] also held that her constitutional due process rights were not violated because a suspension which does not exceed ten days is not a protectible property interest.[4] Property interests require legal entitlements which may arise from statutes, ordinances, or contracts,[5] and are determined by reference to state law.[6] The *Dunlap* court reasoned that the statute which provided for appeals established the officer's property interest in her continued employment.[7] Because the statute applied to only those suspensions of *more* than ten days, a person suspended for ten days or less has no such property interest; and thus is without the protections of the due process clause of the fourteenth amendment.[8]

The fourth district took a somewhat different view of this question in *Gerhardt v. City of Evansville*.[9] In *Gerhardt*, two city police officers were suspended without pay by the Police Merit Commission.[10] The trial court dismissed on the grounds that the court lacked subject matter jurisdiction over the officers' complaint in which they sought judicial review of their suspensions. In doing so, the trial court relied upon the Tenure Act, and further held that the Act's ten day limitation was constitutionally proper.[11]

The fourth district held that a suspension for a period of up to ten days without a right of appeal and judicial review violated the petitioners' due process rights.[12] Agreeing that the Tenure Act does not provide for judicial review, the court found a constitutional right of judicial review of administrative decisions in the due process clause of the U.S. Constitution. The court relied upon *Warren v. Indiana Telephone Co.*[13] in holding that judicial review is available even when the statute does not provide for review or in fact prohibits it.[14] The court noted that *regardless* of whether the officers

---

[3]IND. CODE § 18-1-11-3 (amended 1977, 1978, 1980) (repealed 1981) (current version at *id.* § 36-8-3-4(e) (Supp. 1981)).

[4]403 N.E.2d at 888.

[5]*Id.* (citing Gansert v. Meeks, 384 N.E.2d 1140 (Ind. Ct. App. 1979)).

[6]403 N.E.2d at 888 (citing Bishop v. Wood, 426 U.S. 341 (1976)).

[7]403 N.E.2d at 888.

[8]*Id.*

[9]408 N.E.2d 1308 (Ind. Ct. App. 1980), *rehearing denied*, 416 N.E.2d 142 (Ind. Ct. App. 1981).

[10]Paul Gerhardt and Clyde Carlile, members of the Evansville Police Department, were initially suspended for five days without pay, but their suspensions were reduced to three days by the Police Merit Commission of the City of Evansville. 408 N.E.2d at 1309.

[11]*Id.*

[12]*Id.* at 1310.

[13]217 Ind. 93, 26 N.E.2d 399 (1940).

[14]408 N.E.2d at 1310. This survey year, however, the Indiana Supreme Court held that "there is . . . no constitutionally protected right to judicial review of the decisions of fact-finding and appellate tribunals . . . conducting disciplinary proceedings within

have an actual property interest in their employment, they "are denied the opportunity to have the trial court determine whether the Commission has acted according to the law and within its power if there is no review of the Commission's action."[15] The court thereby distinguished the due process requirement of judicial review from the procedural due process requirements of notice and the opportunity for a hearing.[16] On a petition for rehearing,[17] the court directed itself to the conflict arising from its decision and the third district's holding in *Dunlap*.[18] The court, in a much stronger and clearer statement, reiterated that the lack of a property interest does not preclude a right to judicial review, but that "review is dependent upon agency action and not the existence of a protected property interest . . . ."[19]

The *Gerhardt* decisions, however, leave an important question unanswered. Despite its statement that judicial review is required to ensure that the requirements of due process have been met,[20] the fourth district did not determine whether the due process clause imposes any requirements other than judicial review. The court in *Gerhardt* addressed only one side of the issue raised in *Dunlap*—whether the absence of a property interest precludes judicial review. It did not examine the more important issue of whether a preclusion of judicial review, or a statutory intention to do so, means that there is no recognizable property interest which would trigger procedural due process requirements, including notice and the right to a hearing. In the first *Gerhardt* decision, the court remanded the case to the trial court to hear evidence on whether there existed a property interest sufficient to invoke constitutional protections. On petition for rehearing, the court noted that "[j]udicial review does not enlarge any protected interests or grant due process rights where they do not otherwise exist."[21] With the question squarely in front of them, the court should have ruled, or at least provided some guidance, as to what effect the statutory preclusion of review has on determining whether a property right exists.

---

the prison system." Riner v. Raines, 409 N.E.2d 575, 579 (Ind. 1980). Conceding the applicability of due process requirements, the court noted that the various "levels of administrative review by policy makers and high executive officers" was adequate assurance of fair procedures and fair decisions. *Id.*

[15]408 N.E.2d at 1311.

[16]*Id.* at 1310-11.

[17]416 N.E.2d 142 (Ind. Ct. App. 1981).

[18]*Id.* at 143.

[19]*Id.*

[20]*Id.* at 143-44. Judicial review insures that "the requirements of due process have been met, the action is within the scope of authority and the action is according to law." *Id.*

[21]*Id.* at 144.

Last year's Survey Article correctly asserted that the *Dunlap* court erred in determining that the existence of the officer's property interest is established by the Tenure Act.[22] It was an earlier provision of the same Act which clearly indicated that a suspension can only be for cause,[23] and which created the required expectation of continued and uninterrupted employment which is the foundation of the property interest protected by due process.[24] This analysis finds support in two other cases decided this past survey year. In *City of Indianapolis v. Sherman*,[25] a case brought by a former police officer who was demoted from "Technical Captain" to "Captain," the court in construing Indiana Code section 19-1-7-6[26] held that due process protections attach "when such 'cause' is required before an employment relationship may be altered to the detriment of the employee."[27] In *Indiana Alcoholic Beverage Commission v. Gault*,[28] the court read Indiana Code section 7.1-2-2-12[29] as giving the Commission the authority to employ and remove, *at will*, members of the Indiana State Excise Police, and held that a member of that force with almost twenty years of service was not entitled to procedural safeguards when demoted from captain to officer.[30] The court stated that where one's employment is at the will of a government agency, that person has no property interest in a particular rank and is therefore not entitled to procedural due process protections.[31]

In determining whether a property interest exists, the courts should look to the nature of the public employment relationship, that is, whether one serves at will, giving the agency total discretion to alter or terminate the relationship, or whether one's status is protected by a requirement of cause, before changing the nature of the relationship in a manner detrimental to the employee.

2. Notification of the Right to Counsel.—Once the court has determined that a property or liberty interest exists which triggers the applicability of due process requirements, it must next examine what procedural safeguards are required under the circumstances of the individual case. Several cases in this survey year examined whether an applicant for unemployment compensation benefits is

---

[22]Greenberg, *supra* note 2, at 83-84.

[23]IND. CODE § 18-1-11-3(a) (amended 1977, 1978, 1980) (repealed 1981) (current version at *id.* § 36-8-3-4(b) (Supp. 1981)).

[24]Greenberg, *supra* note 2, at 83-84.

[25]409 N.E.2d 1202 (Ind. Ct. App. 1980).

[26]IND. CODE § 19-1-7-6 (1976).

[27]409 N.E.2d at 1206.

[28]405 N.E.2d 585 (Ind. Ct. App. 1980), *transfer denied*, Nov. 14, 1980.

[29]IND. CODE § 7.1-2-2-12 (1976).

[30]405 N.E.2d at 590.

[31]*Id.* at 589.

denied due process[32] when the agency fails to inform him of his right to be represented by counsel before the hearing referee.

The fourth district of the Indiana Court of Appeals held in *Sandlin v. Review Board of the Indiana Employment Security Division*,[33] that due process "requires an administrative procedure reasonably calculated to inform a claimant of his right to appear by counsel."[34] Sandlin had been denied unemployment compensation benefits based upon a finding that he had voluntarily left work without good cause. There was no evidence that he had ever been informed, prior to or at the hearing, that he had a right to be represented by counsel. Near the end of the hearing, it also became evident that Sandlin could not read and had only progessed to the seventh grade.[35]

The court of appeals, using the balancing test developed by the Supreme Court in *Mathews v. Eldridge*,[36] found that a qualified applicant's substantial interest in unemployment compensation benefits,[37] coupled with the nature of the proceeding and the role that an attorney may play in effectively representing the claimant's position, outweighed the minimal administrative expense required to inform the claimant of his right to counsel.[38] The court pointed out that it was not necessary to inform the claimant on the record at the hearing, but rather the Board should do so when various forms and notices are supplied to the claimant informing him of his evidentiary hearing before the referee.[39] The court said that the agency could adopt any procedure it deemed appropriate to provide notice of the right to counsel, however, the notice must be in writing.[40]

The first and third districts reached somewhat different results

---

[32]Indiana courts have determined that an applicant has a constitutionally protected "property interest" in the receipt of unemployment benefits and have thus recognized the applicability of procedural due process in proceedings before the Indiana Employment Security Division to establish eligibility. *See, e.g.*, Wilson v. Review Bd. of the Ind. Employment Security Div., 385 N.E.2d 438 (Ind.), *cert. denied*, 444 U.S. 874 (1979).

[33]406 N.E.2d 328 (Ind. Ct. App. 1980).

[34]*Id.* at 333.

[35]*Id.* at 329.

[36]424 U.S. 319 (1976). This case, dealing with Social Security disability benefits, established that the interest of the individual, the nature and effectiveness of the procedure in question, whether additional procedures would decrease the risk of error, and the interests of the government are the factors to be considered as to whether any given administrative procedure meets the due process requirements. *Id.* at 335.

[37]The court noted that during periods of economic hardship, unemployment compensation benefits might provide an individual or a family with the means of purchasing essentials such as food and housing. 406 N.E.2d at 332.

[38]*Id.* at 331-32.

[39]*Id.* at 332.

[40]*Id.* at 333.

on this issue. In *Walker v. Review Board of Indiana Employment Security Division*,[41] the third district affirmed the Board's decision to deny unemployment compensation benefits, holding that neither due process nor the rules of procedure governing hearings in unemployment compensation cases requires that the referee advise a claimant of his right to counsel.[42] "A fair hearing requires only that the parties be permitted to testify freely and that they not be deprived of their right to counsel or of their right to offer and cross-examine witnesses."[43] Because there was no evidence in this case that the referee *denied* claimant the opportunity to be represented by an attorney, no reversible error had been demonstrated.[44]

The first district in *Foster v. Review Board of Indiana Employment Security Division*,[45] recognized that under *Sandlin*, a party has a due process right to notice of the right to counsel.[46] Although *Sandlin* did not require the *referee* to provide such notice, *Foster* further noted that the record in the case before it was devoid of any notice "*at anytime*" having been given the claimant.[47] The first district held, however, that to be entitled to a new evidentiary hearing, the claimant must show that she was prejudiced by this error, that is, that the failure to notify her of her right to counsel affected substantial rights of the claimant.[48] The court found that the claimant had fully explained her reasons for leaving her employment and that it "would be a mere presumption" by the court to hold that counsel would have introduced further evidence to establish "her 'good cause' for leaving her job."[49] The court refused to remand on

---

[41]404 N.E.2d 1363 (Ind. App. Ct. 1980), *transfer denied*, Dec. 12, 1980.

[42]*Id.* at 1364-65.

[43]*Id.* at 1364.

[44]The *Walker* case also dealt with an administrative rule which provides that when a party is not represented by an attorney, it is the duty of the referee "to examine that party's witnesses, and to cross-examine all witnesses of the other party, in order to insure complete presentation of the case." IND. AD. RULES & REGS. § (22-4-17-3)-1 (Burns 1976) (current version at 640 IND. AD. CODE § 1-11-3 (1979)). The court, after reviewing the entire record, held that the referee had carried out his duties when he asked pertinent questions of the claimant and gave the claimant the opportunity to tell his side of the story. 404 N.E.2d at 1364. Although the claimant alleged that the referee failed to ask enough questions regarding the circumstances surrounding the termination of his employment and to call a particular witness, the court held that the "presentation of evidence is within the sound discretion of the referee to be admitted as he deems necessary" and there was no showing here of abuse of that discretion. *Id.*

[45]413 N.E.2d 618 (Ind. Ct. App. 1980). The court of appeals eventually reversed the Review Board on a different issue. 421 N.E.2d 744 (Ind. Ct. App. 1981).

[46]413 N.E.2d at 620 (citing Sandlin v. Review Bd. of the Ind. Employment Security Div., 406 N.E.2d 828 (Ind. Ct. App. 1980)).

[47]413 N.E.2d at 620 (emphasis in original).

[48]*Id.* at 621.

[49]*Id.*

this issue for a new evidentiary hearing because no prejudicial error was established.[50]

The first district in *Foster* noted that the fourth district in *Sandlin* did not expressly discuss whether the failure to provide notice of the right to counsel requires automatic reversal, or whether it requires the claimant to show prejudicial error.[51] In fact, as *Foster* points out, Judge Chipman stated in *Sandlin* that " '[a]fter a review of the transcript of the referee's hearing, it is evident that Sandlin's . . . case was anemic; there is no doubt that an attorney could have better represented his interests,' " thereby suggesting that the claimant was in fact prejudiced.[52]

Any uncertainty as to whether the fourth district's decision to remand, although not stated as such, was based on the prejudice that resulted from the failure to notify the claimant of his right to counsel, was resolved in April 1981 when that court in *Leon-Roche v. Review Board of the Indiana Employment Security Division*,[53] refused to be persuaded or bound by *Foster*.[54] The fourth district expressly held that the right of an unemployment compensation claimant to be notified of the right to counsel is a basic procedural due process right and that there is no need to show prejudice in order to remand for a new evidentiary hearing.[55] The court quoted a District of Columbia Circuit Court case which stated that although " 'there is limited room in administrative law for the doctrine of harmless error this must be used gingerly, if at all, when basic procedural rights are at stake.' "[56]

Although the districts agree that an agency is required at some point to notify a claimant of his right to counsel at an evidentiary hearing, a split exists regarding whether failure to do so will automatically result in a remand or whether a showing of prejudicial error must be made. It would seem that when the court engages in the balancing test set forth in the numerous Supreme Court deci-

---

[50]*Id.* The first district, relying on *Foster*, reached the same result a second time in Felders v. Review Bd. of the Ind. Employment Security Div., 419 N.E.2d 190 (Ind. Ct. App. 1981). Judge Young, sitting by designation from the fourth district, dissented, arguing that it was not necessary to show actual prejudice. *Id.* at 191-92 (Young, P.J., dissenting).

[51]413 N.E.2d at 620.

[52]*Id.* at 621 (quoting 406 N.E.2d at 333). It is also important to remember that Sandlin had a limited education and was unable to read. *See* text accompanying note 35 *supra*.

[53]419 N.E.2d 801 (Ind. Ct. App. 1981).

[54]*Id.* at 802.

[55]*Id.* at 803.

[56]*Id.* (quoting Yiu Fong Cheung v. Immigration and Naturalization Serv., 418 F.2d 460, 464 (D.C. Cir. 1969)).

sions concerning due process in administrative proceedings,[57] the claimant's interest in ensuring an effective presentation of his position would far outweigh the administrative burden to the state in notifying the claimant of the right to be represented by counsel. The threat of automatic remand would provide a strong incentive for the agency to provide such notice. It would also remove the necessity of judicial speculation as to whether prejudice has resulted from the failure to be represented by counsel.

3. Fair Hearing.—Whether certain procedures employed by administrative agencies were sufficient to protect due process rights or a statutory right to a fair hearing, was the subject of several Indiana cases this survey year.

In the *City of Hammond v. State ex rel. Jefferson*,[58] the court of appeals held that a firefighter suspended from employment for six months was not afforded the fair hearing required by law when the city attorney, whose office represented the city in the hearing before the Hammond Board of Public Works and Safety, also sat on that Board as a decisionmaker in the same case.[59] The court noted that the test of a fair hearing is not simply freedom from impropriety, but freedom from the appearance of impropriety.[60] The court held that the appearance of impropriety in this case was not cured by the fact that the vote of the city attorney was not necessary to constitute a quorum or to order the firefighter's suspension.[61] Nor was the appearance of impropriety cured because the case was not prosecuted personally by the city attorney but rather by his assistant.[62] That same court, however, in a similar case decided just one week later,[63] held that a police officer dismissed for conduct unbecoming an officer, who was apparently aware of the dual role of the city attorney[64] in his hearing before the Board but did not raise an objection to it, was deemed to have *waived* the objection that the arrangement denied him a fair hearing.[65]

In *Featherston v. Stanton*,[66] the Seventh Circuit Court of Appeals considered whether certain procedures employed by the Indi-

---

[57]*See, e.g.*, Goss v. Lopez, 419 U.S. 565, 579-82 (1975); Goldberg v. Kelly, 397 U.S. 254, 264-66 (1970).

[58]411 N.E.2d 152 (Ind. Ct. App. 1981).

[59]*Id.* at 153.

[60]*Id.* at 154 (citing City of Mishawaka v. Stewart, 261 Ind. 670, 310 N.E.2d 65 (1974)).

[61]411 N.E.2d at 154. In fact the vote to suspend was unanimous.

[62]*Id.*

[63]Atkinson v. City of Marion, 411 N.E.2d 622 (Ind. Ct. App. 1980).

[64]The city attorney in *Atkinson* sat on the Board while the deputy city attorney prosecuted the case against the police officer. *Id.* at 624, 629.

[65]*Id.* at 629-30.

[66]626 F.2d 591 (7th Cir. 1980).

ana Department of Public Welfare in reviewing denials of Medicaid benefits, satisfied the constitutional and statutory requirements[67] for a "fair hearing."[68] The claimants first challenged the department's use of dental and medical review panels which provide the information necessary for the agency to determine eligibility for benefits, and the subsequent use of alternate dental and medical review panels which provide a post-hearing, off-the-record evaluation of the evidence presented at the hearing. In both instances, the claimants argued that because the panels were neither present at the hearing nor subject to subpoena, the claimants were denied their statutory right to confront and cross-examine adverse witnesses.

Considering first the dental and medical review panels, the court held that they were not "adverse witnesses" as envisioned by the regulations.[69] "Rather than functioning as adversaries to plaintiff's claims, the initial review panels act as impartial assessors of plaintiff's medical and social histories and as adjudicators of their entitlement to benefits."[70] The use of the review panels was consistent with federal procedures designed to promote efficiency while ensuring reliability and impartiality. The court did find, however, that the failure of the review teams to report reasons for their denial of plaintiff's claims did deprive claimants of their statutory right to a fair hearing. The court in holding that the claimants' procedural rights were violated wrote that, "[i]f the applicant is not made aware of the reasons for the agency's initial denial of his request, then he is not able to '[e]stablish all pertinent facts and circumstances' at his appeal hearing."[71]

Addressing next the use of alternate dental and medical review panels, the court held that "[w]hereas the first review teams act as adjudicators, the alternate panels act as expert witnesses or advisors to the DPW,"[72] and as such their assessments should be made part of the record of the hearing.[73] Because the panels which acted

---

[67]The statutory requirements for "Fair Hearings for [Medicaid] Applicants and Recipients" are found in 42 C.F.R. §§ 431.200-.250 (1980).

[68]The court noted that because the federal regulations applicable to the social security claims at issue prescribe greater procedural safeguards than are mandated by the constitution and because it found that the Indiana procedures do not comply with those regulations, it need not address the constitutional claims. 626 F.2d at 593.

[69]*Id.*

[70]*Id.* at 594.

[71]*Id.* at 595 (quoting 42 C.F.R. § 431.242(c) (1980)).

[72]626 F.2d at 595.

[73]*Id.* The court supported its holding by citing 42 C.F.R. § 431.240(b) (1980), which provides:

> If the hearing involves medical issues such as those concerning a diagnosis, an examining physician's report or a medical review team's decisions and if the hearing officer considers it necessary to have a medical assessment other

as experts to advise the hearing officer gave their opinions off the record, the court held that claimants were denied their statutory right to rebut the panels' opinions as well as their right to a decision based exclusively on evidence introduced at the hearing.[74] Accordingly, the court reversed the district court judgment which had found that the procedures employed by the department were procedurally sufficient, and enjoined the department from utilizing procedures which contravened federal regulations.[75]

Relying on *Addison v. Review Board of Indiana Employment Security Division*,[76] the court of appeals in *Tauteris v. Review Board of Indiana Security Division*,[77] said in dictum that the use of a split hearing to determine unemployment benefits was constitutionally deficient because it denied the claimant an opportunity to cross-examine the employer and to present evidence on his own behalf.[78] In *Tauteris*, however, even though a split hearing procedure was used, the court refused to order a new hearing because the claimant failed, without an adequate explanation, to appear at his scheduled hearing. Having not appeared, the court reasoned that he could not complain that he was prejudiced by the use of this procedure. The court noted that the "skimpy"[79] record before it on appeal was not due to the split hearing procedure nor to the lack of diligence on the part of the referee to develop a record, but rather to the claimant's failure to appear and present any evidence.[80]

This approach is similar to that taken by the first district in the notice of the right to an attorney cases.[81] Despite the recognition of a constitutionally deficient procedure, the court upholds the agency's decision by determining that no prejudice resulted from that defi-

---

> than that of the individual involved in making the original decision, such a medical assessment must be obtained at agency expense and made part of the record.

Id.

[74]626 F.2d at 595 (citing 42 C.F.R. § 431.242(e), .244 (1980)). The Administrator of the Department of Public Works wrote a letter requiring an end to the use of post hearing, off-the-record assessments by alternate review teams, but the court noted that a letter had no legal force and would not affect the disposition of this appeal. 626 F.2d at 596.

[75]*Id.*

[76]397 N.E.2d 1037 (Ind. Ct. App. 1979). "[W]here the material issue requires for its resolution a determination of the credibility of witnesses, due process requires a meaningful credibility evaluation by the administrative trier of fact." *Id.* at 1041 (footnote omitted). This could only be done at a hearing of all the evidence before the same referee. *Id. See also* Greenberg, *supra* note 2, at 85-86.

[77]409 N.E.2d 1192 (Ind. Ct. App. 1980).

[78]*Id.* at 1194.

[79]*Id.*

[80]*Id.* at 1195.

[81]*See* text accompanying notes 45-50 *supra*.

ciency.[82] Again, it can be argued that the court, once it establishes that an administrative procedure denies due process, has a responsibility to provide an incentive for the agency to discontinue that procedure or to modify it with additional constitutional safeguards. That incentive may take the form of remanding cases which, on the merits, the agency should not have to hear again.

B. Scope of Judicial Review

1. The Substantial Evidence Test.—For the past two years, the Administrative Law Survey has begun with a discussion of the potentially conflicting interpretations of the "substantial evidence test" by the different districts of the Indiana Courts of Appeals.[83] At issue was whether the reviewing court, in determining whether the administrative decision is supported by substantial evidence, must examine the whole record or merely the evidence most favorable to the successful party.[84] Prior to *Citizens Energy Coalition, Inc. v. Indiana & Michigan Electric Company*,[85] a first district case in which whole record review was apparently adopted,[86] the first district utilized the one-sided approach to review administrative decisions.[87] With *Citizens Energy Coalition*, however, last year's Survey celebrated, with admittedly some reservations, the resolution of this uncertainty and conflict which the differing interpretations had implanted in Indiana administrative law.[88] Two first district decisions during this survey period indicate that the celebration *may* have been somewhat premature.[89]

In *Talas v. Correct Piping Co.*,[90] a workman's compensation case in which the claimant appealed a decision by the Industrial Board, the court wrote that "on appeal, the court may not weigh the evidence and where there is a conflict it can only consider that evidence which tends to support the Board's award."[91] In *Wakschlag*

---

[82]*Id.*

[83]Greenberg, *supra* note 2, at 65-67; Greenberg, *Administrative Law, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 39, 39-42.

[84]Greenberg, *supra* note 2, at 65-67.

[85]396 N.E.2d 441 (Ind. Ct. App. 1979), *discussed in* Greenberg, *supra* note 2, at 65-66.

[86]396 N.E.2d at 447.

[87]*See* Indiana Civil Rights Comm'n v. Holman, 380 N.E.2d 1281, 1284 (Ind. Ct. App. 1978).

[88]Greenberg, *supra* note 2, at 65-66.

[89]I, like Professor Greenberg, use the word *may* advisedly.

[90]409 N.E.2d 1223 (Ind. Ct. App. 1980), *vacated on other grounds*, 416 N.E.2d 845 (Ind. 1981). *See* Leibman, *Workers' Compensation, 1981 Survey of Recent Developments in Indiana Law*, 15 IND L. REV. 453, 455-58 (1981) for a detailed account of the facts of this case.

[91]409 N.E.2d at 1226.

v. Review Board of Indiana Employment Security Division,[92] an appeal from a decision of the Review Board denying the employee's claim for unemployment benefits on the grounds that the employee was discharged for the just cause, the court wrote that " '[i]n reviewing the evidence to support the Review Board's determination we may not weigh the evidence and may consider only that evidence and the reasonable inferences therefrom most favorable to the Board's decision.' "[93] This language tends to confuse the issue because it is not clear exactly what the court considered in affirming the agency determination.

In *Talas*, for example, the court refers to the existence of contradictory or "conflicting" evidence on the record.[94] The *Talas* court arguably can be said to have reviewed the record as a whole by taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, an approach based on *Universal Camera v. NLRB.*[95] However, the "review" in *Talas* consisted of little more than an assumption that if such evidence was present, the Board must have considered and weighed that evidence in making its decision. The first district then deferred to the Board on the basis of this implied determination and found the requisite "sufficient evidence" to support the findings made.[96] It is not entirely clear, however, whether the court really did consider only that evidence favorable to the Board's decision. As long as the courts continue to use language that indicates that they will only consider that evidence which tends to support, or is most favorable to, the agency determination, the issue of whether review on the whole record or one-sided review has been used, will remain unclear.

The third district used a similar approach in another decision involving the Review Board. In a footnote to *Russell* v. *Review Board of the Indiana Employment Security Division*,[97] the court wrote "[i]n reviewing the evidence to support the Board's determination, the court will examine only that evidence and the reasonable inferences therefrom favorable to the Review Board's decision."[98] Nevertheless, the court did not conclude that the Board's findings were supported by the evidence. The court noted that the transcript of the hearing

---

[92]413 N.E.2d 1078 (Ind. Ct. App. 1980).

[93]*Id.* at 1082 (quoting Ervin v. Review Bd. of the Ind. Employ. Security Div., 173 Ind. App. 592, 598, 364 N.E.2d 1189, 1193 (1977)).

[94]409 N.E.2d at 1227-28.

[95]340 U.S. 474, 477-78 (1951).

[96]409 N.E.2d at 1228. The decision of the first district court of appeals was vacated by the supreme court because the Board failed to make specific, basic findings of fact to support its ultimate finding. 416 N.E.2d 845, 846 (Ind. 1981).

[97]415 N.E.2d 774 (Ind. Ct. App. 1981).

[98]*Id.* at 776 n.1 (citations omitted).

was so unintelligible as to leave the court "questioning how any factual findings may [have been] premised thereon."[99] The transcript, the "disorganized and vague nature of the questions posed, and the referee's apparent satisfaction with unresponsive and unintelligible answers," led the court to believe that an incomplete presentation of the case was made and that there was insufficient evidence in the record to support the Board's findings.[100]

2. Standard of Review.—The proper standard of review on questions of fact is that which considers the record as a whole to determine if there is substantial evidence of probative value to support the agency's findings. The court should not reweigh the evidence nor substitute its judgment for that of the agency. If there is substantial evidence, the court must uphold the agency's determination. It is only if "reasonable men would be bound to reach the opposite conclusion from the evidence in the record will the decision be reversed."[101] This limitation on the court's role in reviewing agency decisions, however, applies only to questions of fact. As to questions of law, the court may always inquire as to whether the agency determination was proper.[102]

A more difficult question arises in distinguishing between a question of law and a question of fact. In *Aaron v. Review Board of the Indiana Employment Security Division*,[103] the court of appeals reversed a decision of the Board because its conclusion of law was inconsistent with its finding of fact. The issue to be decided in *Aaron* was whether employees at an "exempt" plant, whose unemployment resulted from a selective strike of other plants in the labor union, could receive unemployment benefits. Although the Review Board found that curtailed production was caused by the union strike at other plants, it concluded, however, that those laid-off employees were nevertheless entitled to unemployment benefits because their unemployment was not due to a labor dispute at their

---

[99]*Id.* at 777.

[100]*Id.* The court in *Russell* was especially concerned that the claimant was not represented by counsel. In such situations, the referee has a special duty to ensure the claimant's rights are protected. *A "review of the entire record"* led the court to believe that the referee had failed to fulfill that duty. *Id.* (emphasis added).

[101]Duncan v. George Moser Leather Co., 408 N.E.2d 1332, 1340 (Ind. Ct. App. 1980); *see also* Tauteris v. Review Bd. of the Ind. Employment Security Div., 409 N.E.2d 1192, 1195 (Ind. Ct. App. 1980).

[102]"Under a strictly judicial review . . . , in addition to determining whether or not the order of the Commission is supported by substantial evidence, there is another matter in which the court may always inquire, and that is the question whether or not the order is contrary to law." Public Serv. Comm'n v. City of Indianapolis, 235 Ind. 70, 82, 131 N.E.2d 308, 312 (1955), *quoted in* Goffredo v. Indiana State Dep't of Pub. Welfare, 419 N.E.2d 1337, 1338 (Ind. Ct. App. 1981).

[103]416 N.E.2d 125 (Ind. Ct. App. 1981).

own facilities.[104] The court of appeals noted that it had to accept the Board's findings without reweighing the evidence. The limitation on the court's scope of review would not permit the court to entertain any arguments regarding the cause of the unemployment at the exempt plants.[105] " 'At the first level of review, we examine only the relationship between the premises and the conclusion, and ask if the Board's deduction is 'reasonable'. . . . The inquiry at this first level of review may be termed a 'question of law.' "[106] In applying this first level of review, the court reversed the Board because its conclusion of law was inconsistent with its finding of fact.[107]

The "substantial evidence" test with respect to factual determinations, the "reasonableness" test (often used when policy determinations are at issue),[108] and the ability of a court to designate an issue as a question of law rather than a question of fact, make it extremely difficult to find consistent patterns in the judicial review of administrative decisions. There is a certain elasticity in each of these standards which allows a court to fashion the nature of its review and the degree of deference it grants to the agency's determination. It is often difficult to understand or predict the results when courts apply those standards in a practical context. The reasons for this problem are related to the nature of the issues involved in agency proceedings, the nature of the agencies invested with the power to make those decisions and the effect of those decisions on the various parties involved and on society as a whole. There is a certain tension between decisions affecting the social and economic welfare of our citizens are made by officials which are seemingly not always responsible to the elective process, and the need for the efficiency and specialized knowledge administrative agencies can provide. Despite the constant admonition that courts are not to substitute their views for that of the decisionmakers, there is a real difficulty in determining when a court will decide that there is enough information to conclude that a reasoned decision has been made and when there is not. Often that determination

---

[104]*Id.* at 129.

[105]*Id.* at 133.

[106]*Id.* (citing Gold Bond Bldg. Prods. Div. v. Review Bd. of the Ind. Employment Security Div., 169 Ind. App. 478, 486, 349 N.E.2d 258, 263 (1976)).

[107]The court held that the employees were interested in the outcome of the strike in that they would benefit from its successful completion and, as the Board found, their unemployment was caused by the strike. 416 N.E.2d at 133. Thus, the court held that they were parties to a "labor dispute" at their "establishment" and were therefore ineligible for unemployment benefits. *Id.*

[108]Several cases during this survey period dealt with the reasonableness of agency policy decisions. *See, e.g.*, Indiana Dep't of Pub. Welfare v. Crescent Manor, 416 N.E.2d 470 (Ind. Ct. App. 1981); Puckett v. Review Bd. of the Ind. Employment Security Div., 413 N.E.2d 295 (Ind. Ct. App. 1980), *transfer denied*, April 29, 1981.

may depend upon the court's acceptance of the decision itself and its confidence in the agency that made it.

C. *The Requirement of Findings*

1. When Are Findings Required?—The requirement of specific findings on all the factual determinations material to the ultimate conclusions of the administrative body is critical to any judicial review of an administrative decision.[109] The policies underlying this requirement were discussed by the court of appeals in *Office of the Public Counselor v. Indianapolis Power & Light Co.*,[110] a challenge to an order of the Public Service Commission approving the power company's application for an increase in its charge for electrical service. The court first stated that formulating basic findings on all material issues assures a reasoned analysis of the request and avoids "arbitrary or ill-considered action."[111] Second, specific findings assure meaningful judicial review and diminish "the possibility of 'judicial substitution of judgment or [sic] complex evidentiary issues and policy determinations.' "[112] Further, without specific findings, the court cannot fulfill its standard of review which is to ensure that the "choice made by the Commission was based on a consideration of the relevant factors and was reasonably related to the discharge of its statutory duty."[113]

In *State ex rel. Newton v. Board of School Trustees*,[114] an action for reinstatement was brought by a tenured teacher whose contract had been cancelled.[115] The Indiana Court of Appeals held that specific findings must be made even though neither the applicable statute[116] under which the school board had cancelled the contract, nor the Administrative Adjudication Act, required specific findings.[117] The court wrote that an administrative body has a duty to make a finding of the pertinent facts on which its decision is based, regardless of any statutory requirement, in order to facilitate judicial review and "to preserve the limited scope of a reviewing court's inquiry."[118]

---

[109]L.S. Ayres & Co. v. Indianapolis Power & Light Co., 169 Ind. App. 652, 661-62, 351 N.E.2d 814, 822 (1976).

[110]413 N.E.2d 672, 677 (Ind. Ct. App. 1980) (citing 169 Ind. App. 652, 351 N.E.2d 814).

[111]413 N.E.2d at 677.

[112]*Id.* (quoting 169 Ind. App. at 662, 351 N.E.2d at 822).

[113]413 N.E.2d at 678.

[114]404 N.E.2d 47 (Ind. Ct. App. 1980). *See* Greenberg, *supra* note 2, at 71.

[115]404 N.E.2d at 48.

[116]Act of Mar. 8, 1927, ch. 97, § 2, 1927 Ind. Acts 260 (amended 1933) (repealed 1976).

[117]404 N.E.2d at 48.

[118]*Id.* at 48-49.

Are there any situations in which findings will not be required by the courts? This issue arose in *Hills v. Area Plan Commission.*[119] In order to effectively analyze this case, however, it is first necessary to examine an earlier case decided during this survey year, *Schenkel v. Allen County Plan Commission.*[120] In *Schenkel*, several landowners challenged two decisions of the plan commission: (1) the Commission's approval of the *preliminary* plats and development plans for a proposed subdivision, and (2) their approval of the *final* plat and development plan. The trial court dismissed both challenges and the landowners appealed. The court of appeals affirmed the trial court's decision regarding the preliminary plan, holding that the decision lacked the element of finality that would subject it to judicial review.[121] The court noted that plan commissions have the authority to make two types of determinations: "recommendations" and "decisions." The court refused a literal reading of the applicable statute[122] which would have made the approval of the preliminary plat and plan a "decision", holding instead that the Commission's action was not subject to judicial review because it did not represent "a consummation of the administrative process."[123] The court, however, did remand the cause of action pending the Commission's approval of the final plat and development plans because that was a reviewable "decision" which required specific findings.[124]

In *Hills*, the first district court of appeals distinguished *Schenkel* and held that a plan commission is not required to make findings when it serves in an advisory capacity to a legislative body.[125] Elvin Hills filed a petition with the Area Plan Commission of Vermillion County requesting that his real estate be rezoned from agricultural to urban residential. Following a hearing, the Commission denied Hills' petition without making any findings of fact. Hills then submitted his application to the Board of County Commissioners, in effect requesting an amendment to the zoning ordinance. The Board also denied the petition after holding a public hearing, and again no specific findings of fact were made. The trial court determined that neither body had acted arbitrarily or capriciously, nor was either required to make written findings of fact.[126]

In distinguishing this case from *Schenkel*, the *Hills* court noted

---

[119]416 N.E.2d 456 (Ind. Ct. App. 1981), *transfer denied*, June 17, 1981.

[120]407 N.E.2d 265 (Ind. Ct. App. 1980).

[121]*Id.* at 269.

[122]IND. CODE § 18-7-5-28(8) (1976) (repealed 1979) (current version at *id.* § 36-7-4-405(a)(2) (Supp. 1981)).

[123]407 N.E.2d at 268.

[124]*Id.* at 270.

[125]416 N.E.2d at 463.

[126]*Id.* at 459.

that in *Schenkel*, the Plan Commission had the ultimate authority to approve plats and plans for subdivision; the exercise of this authority constituted a "decision" and thus findings of fact were required. In *Hills*, however, the Plan Commission's role was purely advisory.[127] The Plan Commission in *Hills* conducted a hearing, made a "recommendation" regarding the feasibility of the requested rezoning, and reported this to the legislative body. The court held that a "recommendation" need not be accompanied by specific findings of fact.[128] The court went on to hold that the Board of County Commissioners in *Hills*, who acted upon the requested rezoning, was acting in a legislative capacity and also was not required to make findings of fact.[129] Therefore, no specific findings of fact were ever made by either body to support or explain the final determination.

This result, although probably correct because of the nature of municipal decisions concerning zoning, is nevertheless troubling. Findings, as has been noted,[130] are required in administrative proceedings to ensure the integrity of the decision making process. Although the Plan Commission did not make the "ultimate decision" in *Hills*, specific written findings would have ensured that the process before that body was fair, that the Commission's recommendation was based upon a consideration of relevant factors, and that it was not arbitrary or capricious.[131] More important, however, is the role of findings in ensuring meaningful judicial review. The trial court concluded that " 'there is no evidence that the action of the Vermillion County Area Plan Commission, in denying the petition of plaintiff, acted arbitrarily or capricious [sic] or outside the scope of its authority.' "[132] Although it could be argued that the Commission's action was not reviewable at all,[133] the court of appeals did not take that approach. Instead, the court combined its discussion of whether the decisions of the Board and the Commission were arbitrary and capricious. Having integrated their analysis, the limited scope of

---

[127]*Id.* at 463.

[128]*Id.*

[129]*Id.*

[130]*See* text accompanying notes 110-13 *supra*.

[131]This is especially significant in light of Hills' contention, rejected by the court of appeals, that rezoning was approved in similar instances and that the Commission's and Board's actions therefore denied him equal protection rights. 416 N.E.2d at 458, 462.

[132]*Id.* at 459.

[133]The court discusses City Plan Comm'n v. Pielet, 167 Ind. App. 324, 338 N.E.2d 648 (1975), in which "the court said that a 'decision' of a plan commission was reviewable by certiorari proceedings, but a 'recommendation' was not, and held that a plan commission's recommendation to the city council that an application for a conditional use permit be denied was not a 'decision' reviewable by certiorari." 416 N.E.2d at 462 (quoting 167 Ind. App. at 327-28, 338 N.E.2d at 650-51).

review applicable to legislative decisions forced the court to conclude that the ultimate decision was a reasonable one.[134] If the court of appeals affirmed the conclusion of the trial court that the administrative body's decision or recommendation to deny the petition was not arbitrary or capricious, it did so without the benefit of specific findings of fact or reasons supporting that decision!

2. *What Kinds of Findings Must be Made.*—It is a basic rule of administrative law that findings of fact must contain all the specific facts relevant to the contested issue or issues in order that the court may determine whether the administrative body has resolved those issues in conformity with the law.[135] The findings must therefore be specific enough to ensure intelligent review by the courts.[136] Several cases this survey year discussed the types of issues which require findings of fact, the sufficiency of those findings, and the proper response of the courts when the administrative body has entered findings insufficient to support its ultimate conclusions.

In *Indiana State Board of Embalmers & Funeral Directors v. Keller*,[137] the Indiana Supreme Court was asked to review an action by the Board disapproving a stock sale transaction. The trial court issued a summary judgment against the Board because it was convinced that the Board had intended to prevent the proposed transfer of stock. The trial court held that this intent exceeded the Board's statutory authority.[138] The supreme court, however, was unsure what the Board had actually decided, and held that the trial court erred when it failed to remand the matter to the Board for a clearer statement of its decision and for more specific findings of fact.[139] The court wrote that "the controversy over the substance of the Board's decision illustrates the need for adequate findings of fact."[140]

Two decisions involving the Review Board of the Indiana Employment Security Division also indicate the types of findings required in agency determinations. In both *Foster v. Review Board of the Indiana Employment Security Division*,[141] and *Jones v. Review Board of the Indiana Employment Security Division*,[142] the courts

---

[134]416 N.E.2d at 461-62.

[135]Whispering Pines Home for Senior Citizens v. Nicalek, 333 N.E.2d 324, 326 (Ind. Ct. App. 1975).

[136]Indiana Bell Tel. Co. v. Owens, 399 N.E.2d 443, 445 (Ind. Ct. App. 1980).

[137]409 N.E.2d 583 (Ind. 1980).

[138]*Id.* at 585. The supreme court agreed that the Board's enabling act did not grant it jurisdiction over a stock transaction. *Id.* (citing IND. CODE § 25-15-1-1 to -15 (1976 & Supp. 1981)).

[139]409 N.E.2d at 586.

[140]*Id.*

[141]413 N.E.2d 618 (Ind. Ct. App. 1980).

[142]405 N.E.2d 601 (Ind. Ct. App. 1980).

discussed the requirement that when a decision precludes an award, the findings of fact must exclude every possibility of recovery.[143]

The contested issue in *Jones* was whether the claimants were qualified for trade adjustment benefits by virtue of their being engaged in employment which was related to the production of steel plate and pipe tubing. Despite a discussion in the referee's findings of the claimant's connection with the production of steel plate and pipe tubing, the court complained that it was given no indication of the significance of those facts in the referee's determination.[144] Noting that two inferences could be drawn from the referee's conclusions, the court stated that "by leaving these equally plausible inferences unresolved the Board has not specifically excluded every possibility of recovery. It is not our function to determine if both avenues of recovery were resolved by the evidence presented."[145] The court also complained that the Board's findings failed to illuminate the reasoning processes used in concluding that claimants were ineligible for benefits. These uncertainties made it impossible for the court to "intelligently review the decision."[146]

In *Foster*, one issue was whether the claimant had left her employment for good cause.[147] She listed several reasons for leaving, but the Review Board's decision discussed only one of those reasons. The court held that these reasons were material segments of the issue because they might constitute good cause. It remanded the matter to the Review Board to make specific findings of fact upon all the reasons advanced by the claimant.[148]

In several cases during this survey year, the courts held that certain issues were material and therefore required that specific findings be made.[149] In *Hidden Valley Lake Property Owners Asso-*

---

[143]413 N.E.2d at 622 (citing Wolfe v. Review Bd. of the Ind. Employment Security Div., 375 N.E.2d 652 (Ind. Ct. App. 1978)); 405 N.E.2d at 604-05 (citing 375 N.E.2d 652).

[144]405 N.E.2d at 605.

[145]*Id.*

[146]*Id.*

[147]*See also* notes 45-50 *supra* and accompanying text.

[148]413 N.E.2d at 622.

[149]Barnet v. Review Bd. of the Ind. Employment Security Div., 419 N.E.2d 249 (Ind. Ct. App. 1981) (no specific findings as to whether a rule prohibiting weapons in a factory was uniformly enforced and whether discharged employee knowingly violated rule); Warner Press Inc. v. Review Bd. of the Ind. Employment Security Div., 413 N.E.2d 1003 (Ind. Ct. App. 1980) (claimant's availability for work); Fayette City Dept. v. Health and Hospital Corp., 405 N.E.2d 919 (Ind. Ct. App. 1980) (whether a county welfare department was prejudiced by a hospital's delay in providing notice of indigency resulting in less than an "adequate opportunity to investigate and determine eligibility"); Raham v. Review Bd. of the Ind. Employment Security Div., 405 N.E.2d 606 (Ind. Ct. App. 1980) (manner in which employer was informed of employee's health problem, whether there was medical substantiation, and how the claimant made reasonable efforts to maintain the employment relationship).

ciation v. HVL Utilities, Inc.,[150] the court of appeals held that when an administrative agency decides that an issue is *immaterial*, it must also make a specific finding of immateriality and give its reasons for arriving at that conclusion.[151] Hidden Valley Lakes Utilities had petitioned the Public Service Commission for a certificate of public convenience and necessity, in order to provide water service to a portion of the Hidden Valley Lakes Subdivision. The property owners association intervened, claiming that the real estate developer was itself a public utility and thus a certificate could not be granted to a subsidiary (HVL Utilities) which the developer had created to operate the water and sewer system. The Commission found that it did not have sufficient information to determine whether the developer was a utility and declined to make a specific finding on the issue.

The court of appeals held that the Commission must "in one way or another address each issue raised by the parties before it."[152] If the Commission decides that an issue is immaterial, the agency must make a specific finding to that effect.[153] On petition for rehearing,[154] the court concluded that this requirement was not an unworkable, judicially imposed burden on the agency, nor was it burdensome to require the agency's reasoning as to immateriality. This reasoning would supply the court with "a more intelligible framework for judicial review and lessens the likelihood of judicial substitution of judgment on complex evidentiary issues and policy determinations. [They] also serve to aid the PSC in avoiding arbitrary or ill-conceived action."[155]

What form the findings must take was the subject of a judicial dispute in *Perez v. United States Steel Corp.*[156] Perez initiated a claim for worker's compensation which alleged that he was permanently totally disabled; however, the Industrial Board found he had only suffered a twenty percent permanent partial impairment. On his first appeal, the court of appeals,[157] noting the distinction be-

---

[150]408 N.E.2d 622 (Ind. Ct. App. 1980).

[151]*Id.* at 626.

[152]*Id.*

[153]*Id.* Under the statutory language of Indiana Code section 8-1-2-86, which implies that a certificate should be issued unless there is already an existing utility providing the same service, it was quite possible that whether the developer was itself a utility was immaterial to a decision in whether to grant the certificate. 408 N.E.2d at 626-27 (quoting IND. CODE § 8-1-2-86 (1976)).

[154]Hidden Valley Lake Property Owners Ass'n v. HVL Utilities, Inc., 411 N.E.2d 1262 (Ind. Ct. App. 1980).

[155]*Id.* at 1263.

[156]416 N.E.2d 864 (Ind. Ct. App. 1981). *See* Leibman, *supra* note 90, at 453-55, for a more detailed discussion of this case.

[157]Perez v. United States Steel Corp., 172 Ind. App. 242, 359 N.E.2d 925 (1977).

tween impairment and disability,[158] remanded the matter for further proceedings because no express finding concerning disability had been made.[159] On remand, the Board concluded that Perez had not established total permanent disability and reaffirmed the prior award for partial impairment. Perez appealed again, challenging the sufficiency of the Board's findings.

The majority found that the portion of the Board's decision labelled "Findings" was deficient because it failed to reveal any factual basis for the Board's conclusion.[160] The court concluded, however, that the section denominated "Summary of Evidence," a recitation of medical testimony, was in reality the findings of fact which disclosed the basis for the Board's ultimate conclusion.[161] That this language had not appeared in an appropriate place did not prohibit the court from sustaining the Board's decision since it was merely a "defect in form."[162]

In a strong dissent, Judge Staton argued that the record constituted more than a "defect in form" which could not be cured by "the mere recitation of testimony,"[163] because this failed to attain the necessary standard of sufficiency for findings of fact set forth in *Whispering Pines Home For Senior Citizens v. Nicalek*.[164] Furthermore, he noted that when the Board issues a negative award, thereby precluding compensation, it must exclude every possibility of recovery.[165] The Board is required to make findings on every essential element of a claim for total permanent disability,[166] including a determination that the claimant is unable to " 'carry on reasonable

---

[158]*Id.* at 244-47, 359 N.E.2d at 926-28.

[159]*Id.* at 249, 359 N.E.2d at 929.

[160]That portion of the decision labelled "Findings" indicated that the plaintiff was not permanently totally disabled within the meaning of the applicable definition. 416 N.E.2d at 865.

[161]*Id.* at 865-66.

[162]*Id.* at 866 (citing IND. R. APP. P. 15(E)).

[163]416 N.E.2d at 866 (Staton, J., dissenting).

[164]333 N.E.2d 324 (Ind. Ct. App. 1975), *quoted in* 416 N.E.2d at 866-67 (Staton, J., dissenting). *Whispering Pines* defined a sufficiently specific finding of fact in the following manner:

> It is a simple, straighforward statement of what happened. A statement of what the Board finds has happened; not a statement that a witness, or witnesses, testified thus and so. It is stated in sufficient *relevant* detail to make it mentally graphic, i.e., it enables the reader to picture in his mind's eye what happened. And when the reader is a reviewing court the statement must contain all the specific facts relevant to the contested issue or issues so that the court may determine whether the Board has resolved those issues in conformity with the law.

333 N.E.2d at 326 (emphasis in original).

[165]416 N.E.2d at 867 (Staton, J., dissenting).

[166]*Id.*

types of employment.' "[167] Judge Staton would have remanded the matter to the Board with instructions to make specific findings in support of its entry of a negative award.[168] Interestingly, Judge Staton anticipated a potential criticism of his approach by noting that it is in the Board's best interest to make specific findings. This prevents the court from "wander[ing] aimlessly" through the record in search of a factual foundation for the award.[169] Administrative agencies have much to gain by making their findings specific and their reasoning clear. Specific findings and articulate explanations of the reasoning processes inspire public confidence in administrative decisions, and ensure meaningful and more limited judicial review.[170]

D. *Reviewability of Agency Decisions*

In *Jaymar-Ruby, Inc. v. FTC*,[171] a federal district court held that a determination by the Federal Trade Commission to release its investigative files containing confidential business information to state attorneys general was a nonreviewable discretionary administrative function, exempt under the Administrative Procedure Act.[172] The court said that although the subpoenaed information was received by the agency prior to the passage of the Federal Trade Commission Improvements Act of 1980,[173] which permits the disclosure of otherwise non-disclosable information to other law enforcement agencies upon certification that certain conditions have been met,[174] the Act was applicable here.[175]

---

[167]*Id.* at 868 (quoting Perez v. United States Steel Corp., 172 Ind. App. 242, 246, 359 N.E.2d 925, 927 (1977)).

[168]416 N.E.2d at 870 (Staton, J., dissenting).

[169]*Id.*

[170]*Id.*

[171]496 F. Supp. 838 (N.D. Ind. 1980).

[172]*Id.* at 845 (construing 5 U.S.C. § 701(a)(2) (1976)).

[173]Pub. L. No. 96-252, 94 Stat. 374 (1980).

[174]The Federal Trade Improvements Act amended section 6(f) of the Federal Trade Commission Act (15 U.S.C. 46(f)) by adding:

> *Provided*, That the Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential, except that the Commission may disclose such information to officers and employees of appropriate federal law enforcement agencies or to any officer or employee of any State law enforcement agency upon the prior certification of an officer of any such Federal or State enforcement agency that such information will be maintained in confidence and will be used only for official law enforcement purposes.

Id.

[175]The court's reasoning was that even though the materials had been *submitted prior* to the effective date of the Act, the FTC sought to *disclose* the documents *after* its effective date. 496 F. Supp. at 843-45.

Having decided that the agency had the authority to release the information, the court examined whether the exercise of that authority was subject to judicial review. The court noted that judicial review will be precluded when an agency action has been committed by Congress entirely to administrative discretion.[176] This discretionary function exemption is narrow. Whether an administrative action falls within that exemption depends upon "(1) the appropriateness of the issues raised for review by the Courts; (2) the impact of review on the effectiveness of the agency . . .[177] and (3) the need for judicial supervision to safeguard the interest of the plaintiffs."[178] Applying these factors, and looking at the language of the statute, its statutory design and legislative history, the court held that it could not review the agency's decision to release the documents.[179]

This case could be extremely significant because of the strong presumption favoring judicial review of administrative decisions. This author believes, however, that the court's decisions will be limited to factual situations similiar to that of the instant case.[180]

E. Exhaustion

In *Bowen v. Sonnenburg*,[181] a class action suit was brought on behalf of patients in state institutions for the mentally handicapped and retarded to secure compensation for sevices rendered by them, in accordance with the minimum wage and overtime provisions of the National Labor Standards Act.[182] The state argued, *inter alia*, that the Patient's Remuneration Act[183] provided an administrative remedy that should have been utilized before any civil action was maintained.[184] The lower court, in granting partial summary judg-

---

[176]*Id.* at 844.

[177]In applying this test, the court expressed more concern that review would undermine the orderly and effective conduct of *state* investigations than that it would adversely affect the processes of the FTC. *Id.*

[178]*Id.*

[179]*Id.* at 845.

[180]In Chrysler Corp. v. Brown, 441 U.S. 281 (1979), the Supreme Court held that an agency decision to disclose confidential business information was reviewable by the court because the Trade Secrets Act, 18 U.S.C. § 1905 (1976), made it a criminal offense for an agency employee to disclose confidential business information unless such disclosure was "authorized by law." 441 U.S. at 317-18. The court held that section 1905 and "any authoriz[ation] by law contemplated by that section place substantive limits on agency action," thus there is "law to apply" and the decision to disclose is therefore reviewable. *Id.* at 318.

[181]411 N.E.2d 390 (Ind. Ct. App. 1980).

[182]29 U.S.C. §§ 201-19 (1976 & Supp. III 1979).

[183]IND. CODE §§ 16-13-12.8-1, -4 to -8 (1976 & Supp. 1981).

[184]411 N.E.2d at 394.

ment to the plaintiff patients, determined that they were excused from having to exhaust the available administrative remedies. The court of appeals noted that exceptions to the exhaustion rule may include instances "where compliance with the rule would be futile, where the statute is charged to be void on its face, or where irreparable injury would result."[185] The facts and circumstances of the individual case, however, determine whether exhaustion would be a futile exercise, and this determination usually cannot be disposed of by summary judgment.[186] The court of appeals held that the trial court was premature in finding that exhaustion of administrative remedies would be futile.[187]

In *Indiana State Department of Welfare, Medicaid Divison v. Stagner*,[188] the court of appeals cited factors relevant to whether a party should be able to bypass available administrative channels.[189] These included the character of the question presented and the competency of the agency to answer that question, the avoidance of premature interruption of the administrative process before the agency can develop a factual record, the interest in the agency having a chance to correct its own errors, and the avoidance of deliberate or frequent flouting of established administrative processes.[190] Balanced against all these considerations is the extent or imminence of harm to the party if required to pursue the administrative remedies.[191]

Harold Stagner was a qualified provider of speech and hearing therapy who had been providing therapy to Medicaid patients in nursing homes throughout Indiana. Reimbursement for these services could be made only after a review by the Department of Welfare to determine whether the services provided were medically reasonable and necessary. Claims submitted for services rendered through January 1980 were paid without problem or delay, but approximately eighty percent of those submitted for February and March 1980 were denied because they were found to be medically unnecessary. Stagner filed suit requesting an injunction ordering payment pending resolution of his underlying suit to recover for unreimbursed claims. The Marion County Circuit Court granted the preliminary injunction and the state appealed, arguing that Stagner had failed to exhaust his administrative remedies.[192]

---

[185] *Id.* at 403 (citing Indiana High School Athletic Ass'n v. Raike, 164 Ind. App. 169, 195, 329 N.E.2d 66, 82 (1975)).

[186] 411 N.E.2d at 403.

[187] *Id.*

[188] 410 N.E.2d 1348 (Ind. Ct. App. 1980).

[189] *Id.* at 1351.

[190] *Id.*

[191] *Id.*

[192] *Id.* at 1349.

The court of appeals, applying the aforementioned factors, held that the policies reflected in the exhaustion requirement were disserved by permitting Stagner to bypass his administrative remedies.[193] The court found that an administrative remedy did exist despite the plaintiff's argument that the literal language of the statute providing for appeals applied only to disputes about the amount of the claim and not to cases in which the claim itself was denied.[194] Further, the court held that Stagner's inability to pay his staff or to meet continuing therapy obligations without immediate payment of his claims did not meet the test of irreparable harm that would overcome the requirement of exhaustion.[195] "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."[196] Finally, as to a claim that the administrative procedures utilized deprived Stagner of constitutional rights, the court refused to apply *Wilson v. Review Board of the Indiana Employment Security Division*,[197] which the *Stagner* court believed to have said that exhaustion is *not* required when "the *sole issue* presented to the court is the constitutional adequacy of the administrative procedures."[198] To apply this rule to every case in which a constitutional issue is raised "would permit circumvention of administrative processes by the mere allegation of a constitutional deprivation."[199]

F. Timely Appeals

Indiana courts issued several decisions during the survey year which interpreted statutory requirements that appeals of administrative decisions must be made within prescribed time limitations.

---

[193]*Id.* at 1351.

[194]*Id.* at 1352.

[195]*Id.*

[196]Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958), *quoted in* 410 N.E.2d at 1353.

[197]385 N.E.2d 438 (Ind. 1979).

[198]410 N.E.2d at 1353 (emphasis in original).

[199]*Id.* A similar holding was made during the survey period in Evans v. Stanton, 419 N.E.2d 253 (Ind. Ct. App. 1981), where a Medicaid claimant whose benefits were terminated without a predetermination hearing because he failed to make a timely appeal, filed an action against the agency claiming the Board's regulations were improper and denied him constitutional due process rights. The court held that the claimant should have exhausted his administrative remedies and noted once again that merely raising a constitutional issue does not allow a party to bypass administrative procedures. *Id.* at 255. In fact, the claimant was granted a post-termination hearing to review his eligibility and the hearing officer determined that he was eligible for Medicaid benefits and reinstated his benefits retroactively to the time his benefits were terminated. *Id.* at 254.

The Administrative Adjudication Act (AAA)[200] provides that any person or party aggrieved by any agency order or determination is entitled to judicial review if a petition is filed within fifteen days after receipt of notice that such order, decision, or determination has been made.[201] Failure to file within the prescribed time terminates all rights to judicial review.[202] In *Warram v. Stanton*,[203] the court of appeals held that the Act's fifteen day limitation was applicable to a determination of eligibility and need for public assistance under the welfare laws.[204] It further ruled that the failure to comply with the statutory requirement divested the trial court of jurisdiction to review not only the administrative decision made with respect to the claimant herself, but the power to hear the action as a class action challenging the validity of the regulations determinative of the administrative action.[205]

Warram had applied for Medicaid benefits as a disabled person but her application was denied because she had transferred property in violation of agency regulations.[206] She received an administrative hearing before a hearing officer who upheld the decision of the Marion County Department of Public Welfare. Warram then appealed to the Indiana Department of Welfare which also decided against her claim. She received notice of the final agency decision in a letter dated May 10, 1976. On April 1, 1977, she filed a class action suit in the Marion Superior Court. The first count of her complaint sought judicial review of the final agency determination denying her application. The remaining counts challenged the validity of the regulations under which she was declared to be ineligible, and sought injunctive and declaratory relief. The trial court dismissed the first count because it was not timely filed in accordance with the fifteen day limitation of Indiana Code section 4-22-1-14.[207] A trial was had on the remaining counts and judgment was entered against Warram and the class. Warram appealed the decision regarding the validity of the challenged regulations.

The court of appeals wrote that even though the proceeding sought to be reviewed was not an administrative adjudication under the AAA,[208] the judicial review provision of the Act[209] "delineates

---

[200]IND. CODE §§ 4-22-1-1 to -30 (1976).
[201]IND. CODE § 4-22-1-14 (1976).
[202]*Id.*
[203]415 N.E.2d 114 (Ind. Ct. App. 1981).
[204]*Id.* at 116.
[205]*Id.* at 116-17.
[206]*See* 470 IND. AD. CODE § 9-2 2(40) (1979).
[207]IND. CODE § 4-22-1-14 (1976).
[208]415 N.E.2d at 116 (citing IND. CODE § 4-22-1-2 (1976)).
[209]IND. CODE §§ 4-22-1-14 to -19 (1976).

the procedure for securing judicial review of all administrative orders, decisions, or determinations not clearly and unambiguously excepted therefrom."[210] Failure to comply with those requirements was jurisdictional and clearly foreclosed any review of the adverse administrative decision.[211] The court went on to address the issue of whether the class action challenging the validity of the regulation, and which requested injunctive and declaratory relief, could nevertheless stand. The court held that Warram could not avail herself of an equitable remedy because an adequate statutory means of review has been provided.[212] Furthermore, Warram, who individually was without a claim, could not represent a class. Thus the trial court erred in not dismissing her entire complaint.[213]

The AAA provides that the fifteen day time period specified in section 4-22-1-14, begins after receipt of notice of the final agency decision.[214] Notice is to be provided in accordance with the provisions of Indiana Code section 4-22-1-6.[215] In *Solar Sources v. Air Pollution Control Board*,[216] the court of appeals held that notice served upon the party's attorney does not meet the notice requirements of section 4-22-1-6 and start the fifteen day period for filing a petition for review.[217] Indiana Trial Rule 5(B),[218] which provides for the service of process upon the attorney of a party in civil litigation, is not applicable to proceedings before administrative agencies.[219] Further, the court regarded section 4-22-1-6 as unambiguous and mandatory language which must be taken at its plain meaning,[220] and would not allow the agency to argue substantial compliance, that is, that it had notified the attorney.[221] The court also considered that the time period was already short enough without adding the additional burden of having an attorney communicate with a client after receiving notice of the agency decision.[222]

In *O'Donaghue v. Review Board of the Indiana Employment*

---

[210]414 N.E.2d at 116.

[211]*Id.*

[212]*Id.*

[213]*Id.* at 117.

[214]IND. CODE § 4-22-1-14 (1976).

[215]*Id.* § 4-22-1-6 (1976).

[216]409 N.E.2d 1136 (Ind. Ct. App. 1980).

[217]*Id.* at 1138.

[216]IND. R. TR. P. 5(B).

[219]409 N.E.2d at 1138.

[220]*Id.* at 1139.

[221]*Id.* The court noted that the petitioner was not allowed to argue substantial compliance; it had filed its petition on a Monday when the fifteen day period beginning from the notification of the attorney had ended on the preceding Friday. *Id.* n.3.

[222]*Id.* at 1139.

Security Division,[223] the court, addressing the issue of when the fifteen day period for filing an appeal provided for in Indiana Code section 22-4-17-3 begins to run, held that an unemployment compensation claimant had fifteen days after notification of the referee's decision, not merely fifteen days after the mailing thereof, within which to appeal to the full Review Board.[224] The court felt that its decision was justified by the ambiguous language of section 22-4-17-3,[225] the humanitarian purposes of the Act, and the rule of statutory construction which "seeks to avoid harsh, unjust, or absurd consequences."[226]

Finally, the court of appeals dealt with the appeal process concerning tax assessments in *City of South Bend v. Brooksfield Farm*.[227] Under the statutory scheme existing at that time under Indiana Code section 19-2-7-13, the city's board of public works was to "complete the roll and render its decision as to all the special benefits by modifying or confirming the assessment roll."[228] Its decision as to all benefits was final under then Indiana Code section 18-5-17-1, and not appealable to the courts unless "the owner has filed a written remonstrance with the board."[229] Section 18-5-17-1 also provided that any appeal allowed by law was to be taken by filing a complaint in the appropriate court within thirty days from the date of the challenged decision.[230] Brooksfield Farm sought a declaratory judgment invalidating an assessment made by the city for the construction of a sewer system. Brooksfield Farm alleged that the method of determining the assessment utilized in the proceeding

---

[223]406 N.E.2d 1267 (Ind. Ct. App. 1980).

[224]*Id.* at 1267-68.

[225]IND. CODE § 22-4-17-3 (1976) provides in part:

> Unless such request for hearing is withdrawn, a referee, after affording the parties a reasonable opportunity for fair hearing shall affirm, modify or reverse the findings of fact and decision of the deputy. The parties shall be duly notified of such decision and the reasons therefore, which shall be deemed the final decision of the review board, *unless within fifteen (15) days after the date of notification or mailing of such decision*, an appeal is taken by the board or the director or by any party adversely affected by such decision to the review board.

Id. (emphasis added).

[226]406 N.E.2d at 1267. The court relied extensively on an earlier decision interpreting a similar requirement in IND. CODE § 22-4-17-2 (Supp. 1981). *See* Reece v. Review Bd. of the [Ind.] Employment Security Div., 172 Ind. App. 503, 360 N.E.2d 1262 (1977).

[227]418 N.E.2d 305 (Ind. Ct. App. 1981).

[228]IND. CODE § 19-2-7-13 (1976) (repealed 1981) (current version at *id.* § 36-9-21-13, -14) (Supp. 1981)).

[229]IND. CODE § 18-5-17-1 (1976) (repealed 1980) (current version at *id.* § 34-4-17.5-1 (Supp. 1981)).

[230]*Id.*

was defective because it failed to comply with applicable statutory requirements. Brooksfield Farm had filed neither a remonstrance with the board nor its complaint with the court within the thirty day period provided by statute. When the city failed to appear at the trial, the court granted a default judgment and declared the assessment to be invalid. The city appealed the judgment, arguing that the court lacked subject matter jurisdiction to consider the appeal from the board's decision because Brooksfield Farm had not followed the appellate process set forth in the statute.

The court of appeals noted that compliance with statutory requirements is a condition precedent to "review jurisdiction" by the trial court.[231] The court said that the appeal mechanism set forth in the statute was provided solely to challenge the amount of an assessment; it was not applicable to allegations that the statutory proceedings which validate the assessments were defective. As such neither Indiana Code section 19-2-7-13 nor 18-5-17-1 applied because the plaintiff's right to seek appellate review came not from the statutory scheme, but from the court's general ability to issue declaratory judgments.[232]

Presiding Judge Hoffman dissented, arguing that the fifteen day statutory provision which was applicable to "[a]ll appeals now allowed, or which may hereafter be allowed *by law* from any action or decision of the board of public works . . . ,"[233] included those appeals provided for not only by statute but by judicial decision as well.[234] He stated that "to hold that the thirty day limitation of IC 1971 18-5-17-1 does not apply to Brooksfield Farm is tantamount to holding that the pronouncements of the Indiana Supreme Court guaranteeing the right of judicial review are not law in this state."[235] He also expressed concern that the court's decision frustrated the legislative intent to ensure prompt review of agency decisions, which would allow a city to proceed with its projects at the end of the time period without fear of interruption and future suits.[236]

---

[231]418 N.E.2d at 307.

[232]The court relied on the Uniform Declaratory Judgment Act, IND. CODE § 34-4-10-1 (1976), for its jurisdiction.

[233]IND. CODE § 18-5-17-1 (1976) (emphasis added) (repealed 1980) (current version at *id.* § 34-4-17.5-1 (Supp. 1981)).

[234]418 N.E.2d at 308. A number of earlier Indiana Supreme Court cases had decided that due process mandates that every decision of an administrative agency be reviewable by a court even if the legislature had failed to specifically provide for it. *See, e.g.*, Dortch v. Lugar, 255 Ind. 545, 266 N.E.2d 25 (1971); Mann v. City of Terre Haute, 240 Ind. 245, 163 N.E.2d 577 (1960); State ex rel. City of Marion v. Grant Cir. Ct., 239 Ind. 315, 157 N.E.2d 188 (1959).

[235]418 N.E.2d at 308.

[236]*Id.* at 309.

II. Business Associations

PAUL J. GALANTI*

A. *In Pari Delicto Defense*

This survey period[1] offered the interesting case of *Dan Purvis Drugs, Inc. v. Aetna Life Insurance Co.*[2] In *Purvis*, the court of appeals affirmed an order of the Dekalb Circuit Court dismissing on the basis of the in pari delicto defense Purvis' complaint alleging a violation of the Indiana Antitrust Statutes.[3] Purvis was attempting to stop Aetna from terminating a third party provider agreement in which Aetna reimbursed him for the costs of prescription drugs provided to employees of International Harvester at a minimal dispensing fee. The nature of Purvis' antitrust claims against Aetna are not clear from the opinions. The court did not have to resolve this issue when it determined that the in pari delicto defense, which literally means "in equal fault,"[4] was still good law in Indiana. Indiana courts have previously applied this doctrine to deny relief to an antitrust plaintiff who initiated legal action after cooperating with the defendant in an unlawful scheme.[5]

The thrust of Purvis' appeal was that the in pari delicto defense as applied to private antitrust cases was struck down by the United States Supreme Court's decision in *Perma Life Mufflers, Inc. v. In-*

---

*Professor of Law, Indiana University School of Law—Indianapolis. A.B., Bowdoin College, 1960; J.D., University of Chicago, 1963.

[1]One decision worthy of at least passing reference in this section is Downham v. Wagner, 408 N.E.2d 606 (Ind. Ct. App. 1980). One of the issues in *Downham*, a workers' compensation case, was whether the defendant's husband was his wife's agent which would make her liable for the injury. The court recognized that marriage alone will not create an implied agency relationship. *Id.* at 613. Heffner v. White, 113 Ind. App. 296, 306, 45 N.E.2d 342, 346 (1942); Roper v. Cannel City Oil Co., 68 Ind. App. 637, 640, 121 N.E. 96, 97 (1918). However, a person can be a spouse's agent, particularly if they are engaged in a joint enterprise, 408 N.E.2d at 613; *see* Pierce v. Horvath, 142 Ind. App. 278, 233 N.E.2d 811 (1968), or if the spouse ratifies an otherwise unauthorized act. Lichtenberger v. Graham, 50 Ind. 288 (1875); 408 N.E.2d at 613. The *Downham* court concluded there was sufficient evidence of agency to submit the question to the jury. *Id.*

[2]412 N.E.2d 129 (Ind. Ct. App. 1980).

[3]IND. CODE §§ 24-1-1-1 to -4-4 (1976 & Supp. 1981).

[4]BLACK'S LAW DICTIONARY 711 (5th ed. 1979).

[5]Moore v. Barrett Co., 75 Ind. App. 352, 130 N.E. 649 (1921). The defense is not limited to antitrust actions, and it was most recently applied in a 1975 Indiana Securities Act case. *See* Theye v. Bates, 166 Ind. App. 652, 337 N.E.2d 837 (1975), *discussed in* Galanti, *Business Associations, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 57, 76-79 (1976) [hereinafter cited as *1976 Survey*].

ternational Parts Corp.[6] In *Perma Life*, the Court ruled that by discouraging private actions the doctrine was contrary to the public policy of fostering competition, which is the underlying basis for the federal antitrust laws.[7] The *Purvis* court noted that *Perma Life* involved the Sherman Antitrust Act,[8] not a state antitrust law, and concluded that the decision was not binding on Indiana courts.[9] This treatment of the plaintiff's contention was somewhat cavalier because the Indiana antitrust statutes are patterned after the federal antitrust laws.[10] Consequently, it is appropriate to give considerable weight to federal decisions in interpreting similar Indiana statutes,[11] particularly if the federal court is the United States Supreme Court.

It is possible that *Purvis* is not the last word on the in pari delicto issue. The plaintiff apparently simply asserted that *Moore v. Barrett Co.*[12] should be overruled on the basis of *Perma Life* without substantiating arguments.[13] This was a fatal mistake because there are arguments in favor of the defense in certain situations,[14] and even federal courts have differed on the actual scope of *Perma Life*.

---

[6]392 U.S. 134 (1968). *Perma Life* generated considerable law review commentary when it was decided. *See, e.g., The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 260-66 (1968); Case Comment, 53 MINN. L. REV. 827 (1969); 6 SAN DIEGO L. REV. 117 (1969); 47 TEX. L. REV. 322 (1969); 21 VAND. L. REV. 1083 (1968).

[7]392 U.S. at 138-40. Bishop v. American Preservers Co., 105 F. 845, 846 (N.D. Ill. 1900), was the first antitrust case applying the doctrine. For a general discussion of the in pari delicto defense and the related unclean hands defense see L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 250 (1977); [1980] 16N J. VON KALINOWSKI, BUSINESS ORGANIZATIONS, ANTITRUST LAWS AND TRADE REGULATION § 109.02 (1969); A.B.A., ANTITRUST LAW DEVELOPMENTS 297-99 (1975). The unclean hands defense to an antitrust complaint was severely restricted in Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).

[8]15 U.S.C. §§ 1-7 (1976).

[9]412 N.E.2d at 131.

[10]*See* Citizens Nat'l Bank v. First Nat'l Bank, 165 Ind. App. 116, 128 nn.6 &7, 331 N.E.2d 471, 478 nn.5 &6 (1975). *See also* Bell v. Speed Queen, 407 F.2d 1022, 1027 (7th Cir. 1969); Orion's Belt, Inc. v. Kayser-Roth Corp., 433 F. Supp. 301, 302-03 (S.D. Ind. 1977); Sandidge v. Rogers, 167 F. Supp. 553, 556 (S.D. Ind. 1958) *rev'd on other grounds*, 256 F.2d 269 (7th Cir. 1958); Fort Wayne Cleaners & Dyers Ass'n v. Price, 127 Ind. App. 13, 20, 137 N.E.2d 738, 742 (1956). *Cf. In re* City Investing Co., 411 N.E.2d 420, 427 (Ind. Ct. App. 1980) (IND. CODE § 23-2-3.1-1(i) (1976) was substantially patterned on the Williams Act, 15 U.S.C. § 78n(d)(1) (1976), and the court looked to decisions interpreting the federal statute).

[11]*See* 165 Ind. App. 116, 331 N.E.2d 471. "Due to the dearth of Indiana decisional law under § 24-1-2-7, the similarity between § 24-1-2-7 and 15 U.S.C.A. § 15, and the policy considerations identical to both provisions, federal decisional law enunciated under 15 U.S.C.A. § 15, is of substantial value." *Id.* at 128 n.7, 331 N.E.2d at 478 n.6.

[12]75 Ind. App. 352, 130 N.E. 649 (1921).

[13]412 N.E.2d at 131-32.

[14]*Id.* at 132 n.1.

Specifically, it is unclear whether the decision absolutely abolished the defense or whether it might yet be available to those without equal responsibility for creating or establishing an illegal scheme or who were required by economic pressures to accept such an arrangement.[15]

One distinguished commentator has observed that the in pari delicto defense should be available if it can be shown that the plaintiff voluntarily participated in an illegal scheme from the outset and was equally responsible for carying out its objectives.[16] The thrust of Professor von Kalinowski's position is that persons without choice should not be barred from antitrust recovery, but those who truly are of equal fault should not receive the fruits of the illegality coupled with treble damages for violation of the antitrust laws. Permitting the latter to recover would be detrimental to the efficient enforcement of and contrary to the underlying policy of the antitrust laws.[17]

Purvis does not flatly foreclose this position because, as the court noted, the plaintiff neither made allegations nor raised any inferences regarding the circumstances of the contract to support a conclusion that he was an unwilling participant in the scheme.[18] The court did note that it was "not clear that the policy of encouraging private suits outweighs the public policy of denying relief to a person who is *equally* at fault with the defendant."[19] Thus in an appropriate case a participant in a scheme prohibited by the Indiana Antitrust Statutes might not be barred under the in pari delicto doctrine.

Although the *Purvis* court did not discuss recent decisions from other states considering the in pari delicto defense to actions brought under state antitrust laws, the issue has arisen in other jurisdictions. In *Mailand v. Burckle*,[20] the California Supreme Court

---

[15]*Compare* Premier Elec. Constr. Co. v. Miller-Davis Co., 422 F.2d 1132, 1138-39 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970) *and* South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767, 784 (6th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971) *with* Memorex Corp. v. International Bus. Mach. Corp., 555 F.2d 1379, 1381 (9th Cir. 1977); Semke v. Enid Auto. Dealers Ass'n, 456 F.2d 1361, 1369-70 (10th Cir. 1972); *and* Schokbeton Prods. Corp. v. Exposaic Indus., Inc., 308 F. Supp. 1366, 1369 (N.D. Ga. 1969). *See generally* authorities cited notes 6 & 7 *supra*.

[16][1980] 16N J. VON KALINOWSKI, BUSINESS ORGANIZATIONS, ANTITRUST LAWS AND TRADE REGULATION § 109.02 at 109-11.

[17]*Id.* at 109-11 to -12. However, as Professor Sullivan points out "there is a public as well as a private interest in having the unlawful arrangement challenged. . . . [and] the crucial thing is to assure that notions of fairness inter se do not reduce unduly the likelihood of competitive conditions being restored." L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST at 784 (1977).

[18]412 N.E.2d at 132.

[19]*Id.* at 132 n.1 (emphasis added).

[20]20 Cal. 3d 367, 572 P.2d 1142, 143 Cal. Rptr. 1 (1978).

held that participants in a scheme illegal under the California Antitrust Act were not barred from recovery under the in pari delicto doctrine when they did not bear equal responsibility for establishing the scheme. Similarly, the Texas Court of Civil Appeals in *Berman v. City Products Corp.*[21] held that under the Texas Antitrust Act the "defense would not bar recovery for damages incurred after Berman withdrew from the illegal arrangement."[22]

There are many situations in which allowing a plaintiff to recover for damages resulting from some illegal activity in which he was a participant would be a mockery of justice.[23] On the other hand, there are many situations involving antitrust laws and other regulatory statutes[24] in which blanket application of the in pari delicto defense would be counter-productive. There is considerable flexibility in *Purvis*, and it is to be hoped that Indiana courts will follow the lead of the California and Texas courts, as well as the federal courts, and limit the defense to cases in which the antitrust plaintiff truly is at "equal fault" with the defendant or, as posited in another context, in which the fault of the parties is "clearly mutual, simultaneous and relatively equal."[25]

B. *Securities Fraud*

Several issues pertaining to civil suits brought under the Indiana Securities Act[26] were resolved in *Kelsey v. Nagy*,[27] in which the court of appeals affirmed a judgment of the Porter County Superior Court in favor of the plaintiff Nagy.[28] The dispute arose under sec-

---

[21]579 S.W.2d 313 (Tex. Civ. App. 1979).

[22]*Id.* at 319.

[23]*See, e.g.*, State v. Aammco Automatic Transmissions, Inc., 199 N.W.2d 444 (Minn. 1972).

[24]*See, e.g.*, Young v. Kwock, 52 Hawaii 273, 276, 474 P.2d 285, 288 (1970) (State Securities Law).

[25]Xaphes v. Shearson, Hayden, Stone, Inc., FED. SEC. L. REP. (CCH) ¶ 98,028, at 91,316 (S.D. Fla. 1981).

[26]IND. CODE §§ 23-2-1-1 to -24 (1976 & Supp. 1981). For discussion of the Indiana Securities Act see generally Boehm, *Federal Business Law and the Indiana Lawyer: The Impact of the Securities Law on the General Practitioner*, 48 IND. L.J. 216 (1973); Pasmas, *Securities Issuance and Regulation: The New Indiana Securities Law*, 38 IND. L.J. 38 (1962); Note, *Securities Registration Requirements in Indiana*, 3 IND. LEGAL F. 270 (1969); Doxsee, *Securities Problems in Indiana*, 17 RES GESTAE No. 9, at 6 (1973).

[27]410 N.E.2d 1333 (Ind. Ct. App. 1980).

[28]The Nagys appealed from an order granting summary judgment in favor of certain defendants and from the trial court's failure to submit a question of punitive damages as against defendant Kelsey to the jury on a common law fraud count. The court concluded that they had failed to preserve the alleged errors and had forfeited the right to appeal. *Id.* at 1334-35, 1337-38 (Garrard, P.J. concurring).

tion 23-2-1-19(a) of the Securities Act before it was amended in 1975.[29]

The Nagys had purchased corporate shares from Kelsey thinking they were unissued or treasury shares but which in fact belonged to him.[30] The court concluded that Kelsey's failure to inform the Nagys that they were purchasing his shares was an omission of a material fact to "which a reasonable investor would attach importance when deciding on his course of action."[31] Failure to so inform warranted rescission of the transaction. The court observed that a purchaser of shares would be interested in knowing whether the

---

[29]IND. CODE § 23-2-1-19(a) (1971) (currently codified at IND. CODE § 23-2-1-19(a) (1976)). Before the section was amended in 1975, it provided that:

> (a) Any person who
>
> (1) offers or sells a security in violation of sections 201, 204(d), 301(a) or 502(b); or
>
> (2) offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six percent (6%) per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security and any income received on it, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at six percent (6%) per year from the date of disposition.

Section 23-2-1-19(a) was similar but not identical to Uniform Securities Act (U.L.A.) § 410(a) (Master ed. 1978).

IND. CODE § 23-2-1-19(a) (1976) now provides that:

> Any person who offers, purchases or sells a security in violation of any of the provisions of this chapter, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the violation, is liable to any other party to the transaction, who did not knowingly participate in the violation or who did not have, at the time of the transaction, knowledge of the violation, who may sue either at law or in equity to rescind the transaction or to recover the consideration paid, together, in either case, with interest at eight percent (8%) per year from the date of payment, costs and reasonable attorneys' fees, upon the tender of the security or consideration received by the person bringing the action.

Although the specific language of §23-2-1-19(a) has changed, the same result would be reached if *Kelsey* were brought today.

[30]410 N.E.2d at 1336.

[31]*Id. See* Arnold v. Dirrim, 398 N.E.2d 426 (Ind. Ct. App. 1979) *discussed in* Galanti, *Business Associations, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 91, 91-101 (1981) [hereinafter cited as *1980 Survey*].

proceeds would go to the corporation or to an individual and that if the true source of the shares had been known, the Nagys might have asked Kelsey why he was selling and would have put his representations in an entirely different perspective.[32] There is certainly no reason to quarrel with that conclusion.

Kelsey, however, claimed that the Nagys knew or in the exercise of reasonable care and due diligence could have learned of the omitted fact. The court concluded that nothing in the record indicated they had actual knowledge of the omitted fact which would have barred rescission under section 23-2-1-19(a) which provided a cause of action only to a buyer "not knowing of the untruth or omission."[33]

The court refused to impose an affirmative duty on purchasers of shares to make inquiries and to discover the actual circumstances underlying a securities transaction because if the legislature had intended to require such an investigation, it would have expressly imposed the duty in the Securities Act.[34] For a court to impose a duty of investigation on a buyer would frustrate the purpose of the Securities Act "of substituting a policy of full disclosure for that of caveat emptor."[35] The statutory reference to a buyer not knowing of the untruth or omission was a clear expression of legislative intent that the failure of a buyer to investigate would not bar a civil suit for rescission under section 23-2-1-19(a).[36]

The *Kelsey* court is undoubtedly correct in this conclusion, but it may have overstated the proposition. As the Supreme Court of

---

[32]410 N.E.2d at 1336.

[33]IND. CODE § 23-2-1-19(a) (1971) (currently codified at IND. CODE § 23-2-1-19(a) (1976)).

[34]410 N.E.2d at 1336. *See also* Bradley v. Hullander, 272 S.C. 6, 249 S.E.2d 486 (1978).

[35]410 N.E.2d at 1336. The burden of proving a lack of knowledge of the untruth or omission probably is on the plaintiff. *See* S & F Supply Co. v. Hunter, 527 P.2d 217 (Utah 1974). The requirement is the same for rescission actions brought under section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(2) (1976), which is the basis for civil liability provisions like section 23-2-1-19(a). *See generally* R. JENNINGS & H. MARSH, SECURITIES REGULATIONS 840 (4th ed. 1977). Knowledge of the untruth or omission is a defense to actions brought under section 11 of the Securities Act, 15 U.S.C. § 77k(a) (1976), but under section 11 the burden is on the defendant to prove knowledge. *See generally* 11 H. SOWARDS, BUSINESS ORGANIZATIONS, THE FEDERAL SECURITIES ACT § 9.02 (3) (rev. 1980).

[36]The duty Kelsey was attempting to impose on the Nagys should be distinguished from the specific defense provided in section 23-2-1-19(a)(2) relieving of liability a defendant who "did not know, and in the exercise of reasonable care could not have known, of the untruth or omission . . . ." IND. CODE § 23-2-1-19(a)(2) (1971) (currently codified at IND. CODE § 23-2-1-19(a) (1976)). *See* S & F Supply Co. v. Hunter, 527 P.2d 217 (Utah 1974).

Utah posited in *S & F Supply Co. v. Hunter*,[37] a similar securities act could not:

> Fairly be understood as meaning that a buyer can naively or blindly purchase stocks without concern for the truth or reasonableness of representations made, [and] then if it later develops that it would serve his interests, assert a claim of falsity of a representation about which he previously had no concern, and upon which he had placed no reliance, as a basis for avoiding his contract. This is fairly deducible from the parenthetical clause in the statute quoted above (the buyer not knowing of the untruth or omission).[38]

To be sure, the *Hunter* court was talking about misrepresentations, but the same observation would apply to omissions. A buyer should be barred from rescinding a transaction where an omitted fact was obvious to anyone other than a person who was deliberately seeking to avoid learning the true state of affairs. To construe the act otherwise would make a mockery of the judicial system.[39]

It should be pointed out that the parenthetical emphasized by the *Kelsey* court was deleted in 1975 and that under the current section 23-2-1-19(a) liability runs to persons "who do not have, at the time of the transaction, knowledge of the violation . . . ."[40] In part this change was necessitated by the extension of the provision to cover purchasers as well as sellers of securities who violate the Securities Act.[41] There is, however, no indication that the General Assembly intended to impose a duty to investigate which would reduce liability at the same time it was extending the provision to cover purchasers. Presumably there is still no affirmative duty on a party to make inquiries and discover the actual circumstances of a securities transaction subject to the caveat about "none so blind as those that will not see."[42]

---

[37]527 P.2d 217 (Utah 1974).

[38]*Id.* at 221.

[39]It is interesting to note in this respect that *Kelsey* was decided by the third district court of appeals which also decided Dan Purvis Drugs, Inc. v. Aetna Life Ins. Co., 412 N.E.2d 129 (Ind. Ct. App. 1980), *discussed in* text accompanying notes 2-25 *supra*, applying the in pari delictio defense in an antitrust action in part on the authority of Theye v. Bates, 166 Ind. App. 652, 337 N.E.2d 837 (1975), where the defense was allowed in an action brought under the Indiana Securities Act. *See generally 1976 Survey, supra* note 5 at 76-79.

[40]IND. CODE § 23-2-1-19(a) (1976).

[41]*See generally* Galanti, *Business Associations, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 33, 60 (1975).

[42]Henry, *Commentaries on The Book of the Prophet Jeremiah*, in FAMILIAR QUOTATIONS 386 (J. BARTLETT, 14th ed. 1968).

The *Kelsey* court also rejected the defendant's argument that the Nagys had waived their right to rescind the transaction.[43] No authority on wavier was cited. It is, however, settled that a party who does not promptly repudiate a securities transaction within a reasonable time after discovering facts entitling him to rescind may be barred by laches in an equity action.[44] Section 23-2-1-19(a) permits rescission "either at law or in equity" so the same basic diligence requirement would apply to a defense of waiver. The putative plaintiff must act in good faith. The Nagys satisfied this requirement because they initiated the law suit as soon as they learned of the facts entitling them to rescind the purchase.

Kelsey's contention that the Nagys had to show reliance on the omitted fact was also rejected. Relying on *Arnold v. Dirrim*,[45] the court held that "reliance" need not be shown in an action based on the omission of a material fact.[46] It is not settled if a plaintiff seeking rescission under the Indiana Securities Act because of misrepresentations must prove reliance but such proof is unnecessary in suits brought under section 12(2) of the Securities Act of 1933,[47] which is the prototype for civil liability provisions similar to section 23-2-1-19(a).[48] All a plaintiff must show is that the fact withheld or omitted was material.[49]

Kelsey also contended that the Nagys were required to show that the omission affected the price of the stock and that they had failed to tender the shares as required by section 23-2-1-19(a). The first contention was correctly rejected by the court because the suit was not for damages but for rescission as authorized by section 23-2-1-19(a), and the second contention was properly disallowed because the record showed that the shares and dividends had been

---

[43]410 N.E.2d at 1335.

[44]Schultz v. Rector-Phillips-Morse, Inc., 261 Ark. 4, 552 S.W.2d 4 (1977).

[45]398 N.E.2d 426 (Ind. Ct. App. 1979). *See generally 1980 Survey, supra* note 31, at 91-101.

[46]410 N.E.2d at 1337. *See* Forrestal Village, Inc. v. Graham, 551 F.2d 411 (D.C. Cir. 1977); S & F Supply Co. v. Hunter, 527 P.2d 217 (Utah 1974). *See also* Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972). *See generally* 3A H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 8.23 (rev. 1980).

[47]15 U.S.C. § 77*l*(2) (1976).

[48]Sanders v. John Nuveen & Co., 619 F.2d 1222 (7th Cir. 1980), *cert. denied*, 101 S.Ct. 1719 (1981). *See also* John Hopkins Univ. v. Hutton, 422 F.2d 1124 (4th Cir. 1970), *cert. denied*, 416 U.S. 916 (1974). *See generally* 3A H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 8.23 (rev. 1980); 11 H. SOWARDS, BUSINESS ORGANIZATIONS, THE FEDERAL SECURITIES ACTS § 9.04[1] (rev. 1980); Peterson, *Recent Developments in Civil Liability Under Section 12(2) of the Securities Act of 1933*, 5 HOUS. L. REV. 274 (1967).

[49]Associated Lathing & Plaster Co. v. Louis C. Dunn, Inc., 135 Cal. App. 2d 40, 286 P.2d 825 (1955); E.E. Atkinson & Co. v. Neisner Bros., 193 Minn. 175, 258 N.W. 151 (1935); Fawkes v. Knapp, 138 Minn. 384, 165 N.W. 236 (1917).

tendered prior to the entry of judgment as permitted under the Act.[50]

The court also held that the award of attorneys fees was proper. It construed the applicable language of section 23-1-2-19(a) pertaining to attorneys fees as "mandating" an award of attorneys fees, costs and interest when a plaintiff prevails.[51] The court cited *Young v. Taylor*[52] for this proposition although it is not clear this is correct because the *Young* court was merely upholding an award of attorneys fees.[53] Generally, courts treat the award as discretionary.[54]

C. *Indiana Business Takeover Act*

The Indiana Business Takeover Offers Act[55] was an issue in two cases decided during the survey period.[56] In *City Investing Co. v. Simcox*,[57] the Seventh Circuit affirmed the dismissal of a complaint challenging the constitutionality of the Act under the supremacy[58] and commerce clauses[59] of the United States Constitution. The district court purportedly abstained from deciding the case on the merits because of a perceived question of state law which if resolved could dispose of the controversy and moot the constitutional claims. It then, somewhat inconsistently, went on to uphold the constitutionality of the Act as an alternative holding.[60]

The Seventh Circuit in fact did not reach the merits of the complaint and affirmed on the ground that abstention was warranted under the circumstances of the case.[61] However, on the same day *Simcox* was decided, the court also decided *Mite Corp. v. Dixon*[62] declaring the Illinois Business Takeover Act invalid on grounds simi-

---

[50]IND. CODE § 23-2-1-19(c) (1976).

[51]410 N.E.2d at 1337.

[52]466 F.2d 1329 (10th Cir. 1972).

[53]*Id.* at 1337.

[54]*See* Tremps v. Ascott Oils, Inc., 561 F.2d 41 (7th Cir. 1977); Cola v. Terzano, 129 N.J. Super. 47, 322 A.2d 195 (1974). *Cf.* Melton v. Unterreiner, 575 F.2d 204 (8th Cir. 1978) (award of attorney fees was improper because the plaintiff prevailed under a federal statute rather than state statute which would have permitted attorney fees).

[55]IND. CODE §§ 23-2-3.1-1 to -11 (Supp. 1981).

[56]City Investing Co. v. Simcox, 633 F.2d 56 (7th Cir. 1980). *In re* City Investing Co., 411 N.E.2d 420 (Ind. Ct. App. 1980).

[57]633 F.2d 56 (7th Cir. 1980) (aff'g 476 F. Supp. 112 (S.D. Ind. 1979)). *See generally 1980 Survey, supra* note 31, at 112-17.

[58]U.S. CONST. art. VI, cl. 3.

[59]*Id.* art. 1, § 8, cl. 3.

[60]476 F. Supp. at 116.

[61]633 F.2d at 57.

[62]633 F.2d 486 (7th Cir. 1980), *prob. juris. noted sub nom.* Edgar v. Mite Corp., 101 S. Ct. 2043 (1981). *See generally 1980 Survey, supra* note 31, at 112-17; Galanti, *Corporations, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 133, 161-72 (1980) [hereinafter cited as *1979 Survey*].

lar to those raised by the plaintiffs. *Mite* is presently before the United States Supreme Court.

The dispute in *Simcox* involved the acquisition of shares of Stokely-VanCamp, Inc. (Stokely) by GDV, Inc., a subsidiary of City Investing Company (City). After GDV had acquired more than five percent of Stokely's shares, it filed a Schedule 13D as required by the Securities Exchange Act of 1934.[63] Stokely representatives then contacted the Indiana Securities Commissioner who subsequently issued a cease and desist order prohibiting City and GDV from purchasing any additional Stokely shares.[64] On the same day, the Commissioner brought suit in the Marion County Superior Court seeking to preliminarily and permanently enjoin City and GDV from acquiring any additional Stokely shares. City and GDV filed suit in the federal court seeking declaratory and injunctive relief. The plaintiffs alleged that the Business Takeover Offers Act was preempted by the Securities and Exchange Act of 1934 as amended by the Williams Act, that it imposed an unjustifiable burden on interstate commerce in violation of the commerce clause, and that the Commissioner was a prejudiced decision maker whose proceedings violated their due process rights.[65]

City and GDV then answered and filed a counterclaim in the state court proceeding raising the same issues asserted in their federal action. The district court subsequently entered final judgment in *Simcox* denying the plaintiffs any relief on the basis of abstention and, alternatively, on the basis that the claims were without merit.[66]

The abstention observed in *Simcox* was the so-called *Pullman* abstention orginally articulated by Justice Frankfurter in *Railroad Commission v. Pullman*.[67] Under the *Pullman* doctrine, federal courts will refrain from prematurely deciding constitutional issues pending determination in state court of state law issues central to the constitutional dispute.[68]

---

[63]15 U.S.C. § 78m(d) (1976).

[64]The order was issued without a hearing although the Act then required a hearing before orders could be issued. 633 F.2d at 58. *See* IND. CODE § 23-2-3.1-9(c) (Supp. 1980).

[65]633 F.2d at 59. City and GDV originally sought damages but that claim was struck by the district court and they did not appeal. *Id.* n.7. The Takeover Offers Act has been amended to grant immunity to the Secretary of State, the Securities Commissioner and his staff. IND. CODE § 23-2-3.1-9(c) (Supp. 1981). *See* notes 258-59 *infra* and accompanying text.

[66]633 F.2d at 59.

[67]312 U.S. 496 (1941).

[68]*See* Moore v. Sims, 442 U.S. 415 (1979). There are two other species of abstention in addition to the *Pullman* abstention: (1) the *Burford* abstention where federal courts relegate federal issues to state courts because those issues touch matters of

As the Supreme Court observed in *Colorado River Water Conservation District v. United States*,[69] federal court abstention from exercising federal jurisdiction is the exception, and the abdication of the obligation to decide cases is justified only where requiring the parties to repair to a state court would serve an important countervailing interest.[70] Notwithstanding the *Colorado River* caveat, abstention is appropriate where federal constitutional issues might be mooted or presented in a different posture depending on the determination of state law by a state court.

The *Simcox* court considered the case to fall within "the paradigm of special circumstances" that makes *Pullman* abstention appropriate. It concluded that Indiana courts were likely to find that City and GDV were not making a takeover offer as defined in the Act because GDV had made only unsolicited purchases of shares through a broker-dealer in the ordinary course of its business.[71] The Seventh Circuit was not persuaded that the circulation given to GDV's Schedule 13D which indicated a possible interest in acquiring fifteen to twenty percent of Stokely's shares was a tender offer in disguise as the Securities Commissioner had decided. The court observed that the Commissioner's "construction of the Act has all the earmarks of a 'hometown call.' Indeed, were his interpretation to be sustained by the Indiana courts, the conflict with the Williams Act might well prove irreconcilable."[72] Of course any determination by Indiana courts that the Takeover Act did not apply to GDV's activities would moot the constitutional claims.

The Seventh Circuit rejected the plaintiffs' argument that the *Pullman* abstention was inappropriate because there could not be a speedy and authoritative state adjudication to protect their federal rights. The existence of the two pending state proceedings that could moot the constitutional claims belied that contention.[73] Their argument that abstention would require them to pursue their

---

traditional state concern, *see* Burford v. Sun Oil Co., 319 U.S. 315 (1943); Bickham v. Lashof, 620 F.2d 1238 (7th Cir. 1980); and (2) the *Younger* abstention where federal courts abstain from interferring with state criminal or akin prosecutions out of respect for state functions. *See* Younger v. Harris, 401 U.S. 37 (1971); Bickham v. Lashof, 620 F.2d 1238. *See generally* 1A, PT. 2 MOORE'S FEDERAL PRACTICE ¶ 0.203 (Supp. 1980-1981). C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 4241-4246 (1978).

[69]424 U.S. 800 (1976).

[70]*Id.* at 813. *See also* Babbitt v. United Farm Workers, 442 U.S. 289 (1979); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

[71]633 F.2d at 61 nn.11 & 12.

[72]*Id.* at 61-62.

[73]*Id.* at 62. Furthermore, the cases City and GDV relied on involved civil rights which are "arguably more fundamental than the right to buy or sell stock." *Id.*

remedy to the Indiana Supreme Court was also rejected. As the *Simcox* court pointed out, if the Indiana Court of Appeals held that the Act did not apply to City and GDV, it could dissolve the cease and desist order and permit them to re-enter the market for Stokely shares even without a definitive statement from the Indiana Supreme Court.

In effect, City and GDV were arguing that abstention would be inequitable because the state proceedings would be "inadequate."[74] It appears that they may have been hurt by their strategy of not seeking an injunction in the federal proceeding against the hearing scheduled by the Securities Commissioner.[75] City and GDV had been precluded from purchasing Stokely shares, but this was not sufficiently serious to warrant action contravening that abstention doctrine.

The second argument that City and GDV advanced for rejecting the abstention doctrine was that the Securities Commissioner, who would decide initially if the Act applied, was a "biased and prejudiced decision maker" and that his presiding over the administrative proceedings would violate their due process rights.[76] They argued that no interpretation of the Takeover Offers Act by an Indiana court would resolve the due process claims so the federal courts should rule. This might well have been the case, but, as *Simcox* noted, a decision by an Indiana court would not necessarily "resolve" any of the three challenges but simply make their resolution unnecessary.[77] Furthermore, the district court had found that the Commissioner "held no bias or prejudice against plaintiffs at any time" and "did not prejudge the issues heard by him."[78] The Seventh Circuit did not determine if this finding was clearly erroneous because City's and GDV's due process arguments reduced to their essence were simply a disagreement on whether the state law applied.[79]

Thus, the *Simcox* court concluded that abstention on *Pullman* grounds was not an abuse of discretion. There was, however, some reluctance because abstention could cause inordinate delay or administrative arbitrariness that might impair City's and GDV's rights.[80] Consequently, the court retained jurisdiction of the appeal to consider the merits of the constitutional challenges to the

---

[74] *Id.* at 63.

[75] *Id.* City and GDV only sought injunctive relief against the proceedings in the Indiana action. *Id.*

[76] *Id.*

[77] *Id.* at 63-64.

[78] *Id.*

[79] *Id.*

[80] *Id.*

Takeover Offers Act so, if necessary, City and GDV could return for resolution of those issues after the state law issues had been decided.

The wisdom of the *Simcox* decision was borne out by the decision of the Indiana Court of Appeals in *In re City Investing Co.*[81] reversing the Securities Commissioner's cease and desist order against City and GDV. As anticipated by the Seventh Circuit, the court concluded that GDV's purchase of Stokely shares was not a takeover offer within the meaning of the Act because the filing of GDV's Schedule 13D was not related to a rapid accumulation of Stokely shares and the language of the Schedule 13D discouraged shareholders from supposing that GDV was willing to pay a premium over market price for the shares.[82] The court of appeals also concluded that the Securities Commissioner's finding that statements in GDV's Schedule 13D were false and in violation of section 23-2-1-12(2) of the Indiana Securities Act[83] was not supported by substantial evidence.[84] The court of appeals rejected the state's contention that the Takeover Offers Act was intended to regulate all shifts in corporate control through stock purchases, and not just tender offers, as being "overbroad and contrary to the plain language of the Act."[85] A "takeover offer" is not limited to conventional tender offers. However, the term has an established legal significance. The court presumed that the legislature intended the term to be given its customary legal meaning in the Act absent any indication to the contrary.[86] The definition of takeover offers in the Act contains language similar to that found in section 14(d) of the Securities Exchange Act of 1934 as amended by the Williams Act.[87] Consequently, the *City Investing* court concluded that takeover offers regulated by the Indiana Act are those offers to acquire the equity securities of "a company pursuant to that which is regulated by the Williams Act . . . ."[88]

One commentator has stated that "a tender offer has been conventionally understood to be a publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a

---

[81]411 N.E.2d 420 (Ind. Ct. App. 1980).

[82]*Id.* at 431.

[83]IND. CODE § 23-2-1-12(2) (1976).

[84]411 N.E.2d at 433-34.

[85]*Id.* at 426. Section 23-2-3-1(i) of the Act defines a "takeover offer," with some exceptions, to mean: An offer to acquire or an acquisition of any equity security of a target company which would result in the offeror owning more than ten percent of the target company.

[86]411 N.E.2d at 427. *See* Jensen v. Pritchard, 12 Ind. App. 439, 90 N.E.2d 518 (1950).

[87]15 U.S.C. § 78n(d)(1) (1976).

[88]411 N.E.2d at 427.

specific price."[89] Congress did not define a tender offer in the Williams Act so the meaning of the term has developed on a case by case basis. The Securities and Exchange Commission, however, has suggested eight factors for determining if an acquisition is a tender offer under the Williams Act.[90] These factors "set a tender offer apart from open market purchases, privately negotiated transactions or other kinds of public solicitations."[91]

One proposed definition of a tender offer is whether an "offer to purchase securities [is] likely to pressure shareholders into making uninformed, ill-considered decisions to sell."[92] The *City Investing* court, along with some other courts,[93] has found this definition generally persuasive. Other courts, however, have rejected it as being too broad,[94] and even the *City Investing* court recognized that an overly broad definition of tender offer that would encompass open market purchases would make the Williams Act unworkable.[95] This would reflect the statutory requirements that shareholders tendering shares be able to withdraw them and that shares be purchased at an equal price and pro rata under certain circumstances.[96] Consequently, if open market purchases or privately negotiated purchases of shares were treated as "tender offers," only conventional tender offers would be lawful under the Williams Act. Nothing in

---

[89]Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1251 (1973) [hereinafter cited as *Developing Meaning*].

[90]*See* Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 791 n.13 (S.D.N.Y. 1979). These factors are: (1) whether there has been " 'active and widespread solicitation of public shareholders;' " (2) whether the "solicitation is 'for a substantial percentage of the issuer's stock;' " (3) whether the "offer to purchase is 'at a premium;' " (4) whether the "terms of the offer are 'firm rather than negotiable;' " (5) whether the "offer is 'contingent on the tender of a fixed minimum number of shares;' " (6) whether the "offer is 'open for only a limited period of time;' " (7) whether the shareholders are " 'subjected to pressure to sell their stock;' " and (8) whether " 'public announcements of a purchasing program . . . precede or accompany a rapid accumulation.' " The SEC has proposed an amendment to rule 14d-1(b)(1) that would define an offer for purposes of the Williams Act. [1980] 3 FED. SEC. L. REP. (CCH) ¶ 24,281A.

[91]Wellman v. Dickinson, 475 F. Supp. 783, 824 (S.D.N.Y. 1979).

[92]*Developing Meaning*, *supra* note 89, at 1281.

[93]411 N.E.2d at 429-30. *See also* Panter v. Marshall Field & Co., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,299 at 97,056 (N.D. Ill. 1980); Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455 at 95,590 (N.D. Ill. 1973).

[94]*See* 477 F. Supp. at 790; D-Z Investment Co. v. Holloway, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,771 at 96,563 (S.D.N.Y. 1974).

[95]411 N.E.2d at 429. *See generally* Einhorn & Blackburn, *The Developing Concept of "Tender Offer": An Analysis of the Judicial and Administrative Interpretations of the Term*, 23 N.Y.L. SCH. L. REV. 379 (1978).

[96]15 U.S.C. §§ 78n(d)(5)-78n(d)(7) (1976). *See* Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1207 (2d Cir. 1978).

the legislative history or text of the Act suggests this was the congressional intent.[97]

There is still considerable doubt that open market purchases with an impact on shareholders similar to that of conventional tender offers should be covered by section 14(d). There is authority for applying the Williams Act to nontraditional acquisitions which impose pressures on shareholders like those of conventional tender offers,[98] but assuming that regulation of such acquisitions is desirable, it may be better accomplished by specific legislation rather than by a questionable interpretation of "tender offer."[99]

The *City Investing* court concluded that regardless of how open market purchases should be treated, GDV's acquisition did not warrant condemnation. GDV's Schedule 13D did not generate sound and fury in the market. The statement that they would purchase shares from time to time depending on market conditions would discourage shareholders from supposing City or GDV would pay a premium over the market price to acquire shares immediately. Thus Stokely shareholders were not pressured to sell quickly or lose the opportunity, which could induce hasty, ill-considered decisions.[100]

The only one of the eight factors[101] listed by the SEC for identifying a tender offer clearly present was GDV's expressed interest in a substantial percentage of outstanding Stokely shares. This statement, the Commissioner's finding to the contrary notwithstanding, was not a solicitation because no premium was offered for the shares.[102] The court would not consider the natural rise in the market price caused by the presence of an eager buyer to be a premium because the language of the Schedule 13D directly negatived such an inference.

The *City Investing* court in effect characterized the SEC's tender offer factors as conditions that impose undue pressures on shareholders to make hasty and possibly ill-advised decisions. When

---

[97]411 N.E.2d at 429 *quoting from* Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 790 (S.D.N.Y. 1979).

[98]*See* S-G Securities, Inc. v. Fuqua Inv. Co., 466 F. Supp. 1114 (D. Mass. 1978).

[99]411 N.E.2d at 430. *See generally* Einhorn & Blackburn, *The Developing Concept of "Tender Offer": An Analysis of the Judicial and Administrative Interpretations of the Term*, 23 N.Y.L. Sch. L. Rev. 379 (1978). The SEC has taken an intermediate position—some open market purchases would and others would not be covered by the Williams Act. *See* proposed SEC Rule 14d-1(b)(1). [1980] 3 Fed. Sec. L. Rep. (CCH) ¶ 24,281A.

[100]411 N.E.2d at 431-33. *Compare* S-G Securities, Inc. v. Fuqua Inv. Co., 466 F. Supp. 1114 (D. Mass. 1978) *and* Strode v. Esmark, Inc., [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,538 (Franklin Cir. Ct. Ky. 1980) *with* Chromalloy American Corp. v. Sun Chem. Corp., 474 F. Supp. 1341 (E.D. Mo. 1979).

[101]*See* note 90 *supra*.

[102]411 N.E.2d at 432.

those conditions exist, treating the acquisition as a tender offer subject to the requirements of section 14(d) of the Securities Exchange Act is not improper.[103] In the absence of such pressure, the protection afforded shareholders by section 13(d)[104] and the information contained in the Schedule 13D is sufficient.[105]

The Indiana Securities Commissioner found that City and GDV had violated section 23-2-1-12(2) of the Indiana Securities Act.[106] The court concluded that this finding was contrary to law and unsupported by the evidence.[107] It was bound to accept the facts as found by the Commissioner if supported by the evidence,[108] but the evidence simply did not support the conclusions that City and GDV had made false statements in the Schedule 13D.[109] The Commissioner was in effect drawing self-contradictory inferences from inconsistent findings of fact and attempting to use these inferences to support his conclusions of law.[110] These improper findings and conclusions, with a cease and desist order which in part was meaningless and unenforceable,[111] required the court to set aside the order.[112]

The result in *City Investing* is clearly correct as a matter of law. Although lay persons may decry Indiana's supposed inability "to influence the buy-outs of Hoosier corporations by out-of-state firms—and the state's ability to protect shareholders in those buy-

---

[103]15 U.S.C. § 78n(d) (1976).

[104]*Id.* § 78m(d).

[105]411 N.E.2d at 433. *See* Rondeau v. Mosiner Paper Corp., 422 U.S. 49 (1975); Chromalloy American Corp. v. Sun Chem. Corp., 474 F. Supp. 1341 (E.D. Mo. 1979); Jewelcor, Inc. v. Pearlman, 397 F. Supp. 221 (S.D.N.Y. 1975).

[106]411 N.E.2d at 434.

[107]*Id.*

[108]*See* Mishawaka v. Stewart, 261 Ind. 670, 310 N.E.2d 65 (1974).

[109]For example, the Commissioner found that GDV's statement that it had no current intent to seek control of Stokely was false although GDV could not acquire anywhere near the number of shares owned by incumbent management. 411 N.E.2d at 434.

[110]Perhaps this is the genesis of the remark in City Investing Co. v. Simcox, 633 F.2d 56 (7th Cir. 1980) that the Commissioner's decision had the "earmarks of a 'hometown call.'" *Id.* at 61.

[111]411 N.E.2d at 434 n.9.

[112]*Id.* at 434. *See generally In re* McDonald, 241 Ind. 239, 171 N.E.2d 691 (1961); Hatcher v. Smith, 152 Ind. App. 299, 283 N.E.2d 582 (1972). A reviewing court cannot surmise an agency found facts necessary to support its order, Wabash Valley Coach Co. v. Arrow Coach Lines, Inc., 228 Ind. 609, 94 N.E.2d 753 (1950), nor can it direct an agency to amend or change its findings because a court has no power to decide matters on the merits which are the legislatively decreed province of an agency, Public Serv. Comm'n v. Chicago, I. & L. Ry., 235 Ind. 394, 134 N.E.2d 53 (1956); Braschler v. Review Bd., 120 Ind. App. 294, 90 N.E.2d 362 (1950), or draw inferences counter to those drawn by the agency, Indiana Bd. of Pharmacy v. Horner, 241 Ind. 326, 172 N.E.2d 62 (1961). All it can do is reverse.

outs"[113] or "to halt creeping tender offers,"[114] the question is simply whether the Business Takeover Offers Act applies to the transaction. If it does not, the answer is different legislation—assuming, of course, that states have the constitutional power to legislate in this area.

D. Definition of Security

An unsuccessful condominium development in Connecticut was the genesis of a dispute involving Indiana law in *American Fletcher Mortgage Co. v. U.S. Steel Credit Corp.*[115] In *American Fletcher*, the Seventh Circuit Court of Appeals affirmed a decision of the United States District Court for the Southern District of Indiana denying defendant U.S. Steel Credit Corporation's (Steel) motions for partial summary judgment on the plaintiffs' complaint, summary judgment on its counterclaim, and an order dismissing its securities fraud count.

The original action was brought by American Fletcher Mortgage Company (Mortgage) and American Fletcher National Bank & Trust Company (AFNB) to recover monies disbursed for Steel under a loan participation agreement entered into in connection with the condominium development. Mortgage had made two loans to the condominium developer. It also signed a loan participation agreement with Steel, AFNB, and American Fletcher Mortgage Investor Trust (Trust) for the loan funds.[116] Subsequently, Mortgage proposed an increase in the loans to provide additional funds for the development. Because only AFNB and Trust agreed, the proposal could not be implemented, and the developer eventually defaulted on its obligations. Ultimately, Mortgage, the three loan participants, and the developer entered into a settlement agreement. Steel apparently refused to cooperate unless the other parties waived all claims against it.[117]

The plaintiffs refused to waive their rights. Instead, they filed suit seeking actual and punitive damages for Steel's alleged breach of its express and implied contractual obligations, interference with contractual relations, and breach of duty to its co-participants.[118]

---

[113]Indianapolis Star, Nov. 18, 1980, at 28, col. 1.

[114]*Id.* at col. 3. Interestingly, the "concerns" expressed by the author of this article, the Business Editor of the Indianapolis Star, are just the "concerns" that would justify declaring the Business Takeover Offers Act unconstitutional.

[115]635 F.2d 1247 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 1982 (1981).

[116]*Id.* at 1248-49. Steel was to furnish 40% of the funds, AFNB 10%, and Trust 50%. The participants were to receive principal and interest payments proportional to their loan shares.

[117]*Id.* at 1249.

[118]*Id.* at 1249-50.

Steel counterclaimed against the plaintiffs and filed a complaint against American Fletcher Corporation, the plaintiffs' parent coproration, alleging that the loan participation offerings were securities[119] sold in violation of the Securities Act of 1933,[120] the Securities Exchange Act of 1934,[121] and the Indiana Securities Act.[122] Steel's summary judgment motions were denied, the plaintiffs' motions to dismiss or for judgment on the pleadings on the security fraud counts were granted, and Steel's cross-motion for summary judgment declaring the loan participation a security was denied by the district court.[123]

Steel had argued in its motion for summary judgment that neither AFNB nor Trust were third party beneficiaries of Steel's agreement with Mortgage. The *American Fletcher* court upheld the district court's conclusion that summary judgment was inappropriate because there was a genuine issue of fact whether the participation agreements were intended to benefit AFNB and Trust.[124] The court rejected the contention that under Indiana law an intent to benefit AFNB and Trust had to appear affirmatively from the language of the document. Steel was contractually obligated to reimburse Mortgage for costs and expenses incurred in protecting and preserving the security, to minimize losses in the project and impliedly obligated to act fairly and in good faith. Because these factors would produce a direct benefit to AFNB and Trust, the requirements of Indiana law appeared to have been satisfied.[125] Even if the contract was not clearly intended to benefit AFNB and Trust, it was sufficiently ambiguous for interpretation of the contractual language to be appropriate for trial.[126]

The Seventh Circuit also held that Indiana courts would not require an actual breach of the agreement among Mortgage, AFNB, and Trust to make Steel liable for damages to Mortgage resulting from Steel's dilatoriness. It concluded that Indiana would recognize the somewhat loosely defined tort of interference with contractual

---

[119] *Id.* at 1250.

[120] 15 U.S.C. § 77q (1976).

[121] *Id.* § 78j(b).

[122] IND. CODE §§ 23-2-1-12, -19(a) (1976).

[123] 635 F.2d at 1250-51. Counts in the complaint and counterclaim were dismissed by stipulation and counts in the counterclaim alleging common law fraud and breach of contract were not in issue. *Id.* at 1250 nn.2 & 3.

[124] 635 F.2d at 1251.

[125] *Id. See* Jackman Cigar Mfg. Co. v. John Berger & Son Co., 114 Ind. App. 437, 52 N.E.2d 363 (1944). *See generally* 4 A. CORBIN, CORBIN ON CONTRACTS §§ 772-773, 776-776 (1951); 2 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 347, 356, 356A (1959).

[126] 635 F.2d at 1251. Furthermore, even if AFNB and Trust were not intended beneficiaries, Mortgage still could sue for Steel's alleged breach of its duty of good faith. *Id.*

or business relations[127] and would not limit an actionable wrong to cases in which a breach of contract actually occurred. Decisions such as *Kiyose v. Trustees of Indiana University*[128] and *Martin v. Platt*[129] were of no help to Steel in standing for the proposition that only a third party and not a party to the contract may be liable for tortious interference. This particular aspect of the dispute was not over the contract between Mortgage and Steel, but the contract between Mortgage and AFNB and Trust to which Steel was a third party.

Steel's argument that it was entitled to summary judgment for breach of duty to AFNB and Trust floundered because it could not be taken as a matter of law that they were not third party beneficiaries of the agreement between Mortgage and Steel.[130] Furthermore, when Mortgage acquired title to the project, the loan participants became real estate developers, and Steel's actions delaying Mortgage's ability to implement its proposals for the project constituted a breach of the duty of a party engaged in a common enterprise to act in good faith toward co-venturers.[131]

The most important issue in *American Fletcher* was whether the loan participation was a security within the meaning of section 2(1) of the Securities Act of 1933,[132] section 3(a)(10) of the Securities Exchange Act of 1934,[133] and section 23-2-1-1(k) of the Indiana Securities Act.[134] Steel's entire securities fraud case depended upon the status of the participation. It was undisputed that the meaning of "security" is the same under all three statutes.[135] The resolution of this issue depended on the effect of the qualifying phrase "unless the context otherwise requires" on the definition of security which

---

[127]*See* Spier v. Home Ins. Co., 404 F.2d 896 (7th Cir. 1968); Martin v. Platt, 386 N.E.2d 1026 (Ind. Ct. App. 1979); Gibson v. Miami Valley Milk Producers, Inc., 157 Ind. App. 218, 299 N.E.2d 631 (1973). *See generally* RESTATEMENT (SECOND) OF TORTS § 766A (1979); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 129 (4th ed. 1971).

[128]166 Ind. App. 35, 333 N.E.2d 886 (1975).

[129]386 N.E.2d 1026 (Ind. Ct. App. 1979).

[130]635 F.2d at 1252-53.

[131]*See* Grover v. Marott, 192 Ind. 552, 559, 136 N.E. 81, 83 (1922). *See generally* J. CRANE & A. BROMBERG, LAW OF PARTNERSHIP §§ 35, 69 (1968); H. REUSCHLEIN & W. GREGORY, AGENCY AND PARTNERSHIP § 266 (1979).

[132]15 U.S.C. § 77b(1) (1976).

[133]*Id.* § 78c(a)(10).

[134]IND. CODE § 23-2-1-1(k) (1976).

[135]635 F.2d at 1253. However, some courts have given a broader meaning to "security" under state securities statutes than under the federal statutes. *See, e.g.*, Silver Hills Country Club v. Sobieski, 55 Cal. 2d 811, 361 P.2d 906, 13 Cal. Rptr. 186 (1961); State *ex rel.* Healy v. Consumer Business Systems, Inc., 5 Or. App. 19, 482 P.2d 549 (1971). *Cf.* Wieboldt v. Metz, 355 F. Supp. 255 (S.D.N.Y. 1973) (holding that the sale of franchises was not covered by the Securities Act of 1933).

included "any note . . . or participation in any profit-sharing agreement."[136]

The court applied the *SEC v. W.J. Howey Co.*[137] test of a security as refined in *United Housing Foundation v. Forman*[138] and concluded that the loan participation was not a security. Under *Forman* four elements must be satisfied before a security exists: (1) an investment; (2) in a common venture; (3) premised upon a reasonable expectation of profit; (4) to be derived from the entrepreneurial or managerial efforts of others.[139] Here only the second element, a common venture, was present. Utilizing the increasingly conventional wisdom that the term "security" should be construed narrowly, the *American Fletcher* court considered the participation as merely a collateralized commercial loan. Although the loan was risky, it was no more than "the ordinary commercial risk taken by any secured lender"[140] and not an investment risk. Even Steel must have had some doubts as to how persuasive its argument was going to be because it drafted the participation agreements on typical lenders' forms. Its own loan officer who prepared the proposal recommended that the loans be made contingent on a first mortgage on the property and improvements. Apparently Steel considered the development to be a plain and simple real estate development until it was sued.

The fact that the loan paid interest did not make it a security because Steel did not participate in any profits from the project. Neither the repayment of the loan nor the rate of return was dependent on any profits.[141] Rather, the interest was fixed at a rate

---

[136]635 F.2d at 1253. Steel conceded the notes from the developer to Mortgage were not securities, and Mortgage and AFNB conceded that a loan participation could be a security even though the underlying note is not. *See* C.N.S. Enterprises, Inc. v. G & G Enterprises, Inc., 508 F.2d 1354 (7th Cir.), *cert. denied*, 423 U.S. 825 (1975).

[137]328 U.S. 293 (1946).

[138]421 U.S. 837 (1975).

[139]635 F.2d at 1253. *See* International Bd. of Teamsters v. Daniel, 439 U.S. 551 (1979); Kirk v. Agri-Research Council, Inc., 561 F.2d 96 (7th Cir. 1977). *See generally* 3 H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW §§ 2.02 & 2.19 to -.19B (rev. 1980); 4B Z. CAVITCH, BUSINESS ORGANIZATIONS § 93.01[1][b] (rev. 1981); 11 H. SOWARD, BUSINESS ORGANIZATIONS, THE FEDERAL SECURITIES ACT § 2.01 (rev. 1980).

[140]635 F.2d at 1254 (quoting Lincoln Nat'l Bank v. Herber, 604 F.2d 1038 (7th Cir. 1979)). Furthermore, Steel could not contend it was relying solely on Mortgage's entreprenurial efforts in the venture, another hallmark of a security, because the interest came from the loan not Mortgage's efforts and Steel retained the rights of a creditor such as the right to foreclose. 635 F.2d at 1254.

[141]*See* Canadian Imperial Bank of Commerce Trust Co. v. Fingland, 615 F.2d 465 (7th Cir. 1980); C.N.S. Enterprises, Inc. v. G & G Enterprises, Inc., 508 F.2d 1354 (7th Cir.), *cert. denied*, 423 U.S. 825 (1975).

above the prime rate which was a further indication of a commercial real estate loan transaction.[142]

The Seventh Circuit reemphasized its recent *Lincoln Nebraska Bank v. Herber*[143] decision that Congress did not intend to regulate commercial loan transactions which would not have an impact on the securities market even if the literal wording of the definition of security might include a particular arrangement. The key is the qualifying phrase "unless the context requires otherwise" and the context here is that commercial loans were probably not intended to be encompassed by the securities laws. The *American Fletcher* court refused to follow decisions of the Second Circuit Court of Appeals[144] finding similar arrangements to be securities under the literal language of the statutes. In doing this the *American Fletcher* court seems correct. If the Supreme Court did anything in *Forman*, it rejected the literal language approach to the definition of security. To think that the current Supreme Court would consider an arrangement clearly smacking of a commercial real estate venture a security simply because of the literal language of the securities laws is to engage in wishful thinking.

E. Rights and Liability of a Promoter

The problems faced by a promoter of a corporation or one who renders services to promoters were brought out in *Kincaid v. Lazar*,[145] reversing a judgment of the Hendricks County Circuit Court in Lazar's quantum meruit suit for professional accounting services rendered in forming a corporation. The trial court's findings were in Lazar's favor, but the court of appeals concluded that the findings were clearly erroneous.

Lazar was engaged by Kincaid to form a corporation in which they and three others would be the principals. Kincaid and Lazar agreed that the latter would receive twenty percent of the corporate shares as compensation. There was no agreement that he would receive compensation for his sevices other than the shares. The parties did a rather poor job in reaching an understanding as to their rights and obligations. Subsequently, at a subscribers' meeting after the certificate of incorporation was issued, Lazar did not accept or demand his shares because he was concerned with possible

---

[142]635 F.2d at 1254.

[143]604 F.2d 1038 (7th Cir. 1979). *See also* National Bank of Commerce v. All American Assurance Co., 583 F.2d 1295 (5th Cir. 1978); Emisco Indus. Inc. v. Pro's Inc., 543 F.2d 38 (7th Cir. 1976).

[144]*See* authorities cited 635 F.2d at 1254 n.8.

[145]405 N.E.2d 615 (Ind. Ct. App. 1980).

liability stemming from the corporation's thin debt-equity ratio. He then resigned as a shareholder, director, and officer.[146]

The incorporators continued discussions and eventually reached an "Agreement for the Release and Resignation of Alexander Lazar" under which the remaining subscribers and shareholders agreed to hold Lazar harmless from any liability he may have incurred and he in turn relinquished his interest in the corporation and resigned as an officer and director.[147]

Lazar's quantum meruit action sought quasi-contractual relief for benefits rendered the defendants at their request under circumstances where equity demands compensation to prevent unjust enrichment.[148] The existence of an express contract for services would preclude implication of a contract,[149] and the rights of the parties would be controlled by the express contract. The *Kincaid* court concluded that two express contracts barred Lazar's action.[150] The first was the "understanding" that he would receive twenty percent of the shares for his accounting and consulting services in forming the corporation. He had signed a subscription agreement for these shares. The court upheld the validity of this agreement but, unfortunately, it did not consider the effect of section 23-1-2-6(e) of the Indiana General Corporation Act which provides that "consideration for the issuance of shares of any corporation may be paid, in whole or in part, in money, in other property, tangible or intangible, *or in labor actually performed for, or services actually rendered to the corporation.*"[151] Even if a corporation accepts liability for professional services involved in its formation, it is not clear that such services meet the statutory consideration requirement.

The corporation did not yet exist so it cannot be said the services were rendered "to" it. This problem is not unique to Indiana.[152] Judicial legerdemain might validate such agreements by considering the shares to be issued for "property" and not "promotional services" or by construing the agreement as contemplating that the shares would be issued after the corporation was organized for ser-

---

[146]*Id.* at 617.

[147]*Id.* at 619.

[148]*Id.* (citing Kody Eng'r Co. v. Fox & Fox Ins. Agency, Inc., 158 Ind. App. 498, 303 N.E.2d 307 (1973)).

[149]Deck v. Jim Harris Chevrolet-Buick, 386 N.E.2d 714 (Ind. Ct. App. 1979); Myers v. Maris, 164 Ind. App. 34, 326 N.E.2d 577 (1975); Engelbrecht v. Property Developers, Inc., 156 Ind. App. 354, 296 N.E.2d 798 (1973).

[150]405 N.E.2d at 619.

[151]IND. CODE § 23-1-2-6(e) (1976) (emphasis added).

[152]*See* H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS § 113 at 188 (2d ed. 1970) [hereinafter cited as HENN].

vices rendered previously.[153] Permitting shares for promotional services can be an invitation for fraud because it is possible to form a corporation and issue all of its shares for promotional services which results in an entity with no assets other than its simple corporate existence.[154] This area is one rife with problems and it is only fortunate that few cases arise questioning the issuance of shares for promotional services.

The release agreement signed by Lazar also barred his action.[155] He argued that it did not prevent him from recovering the reasonable value of his services because it was not supported by consideration, the twenty percent interest in the corporation was inadequate consideration for his services, the agreement did not expressly mention release or satisfaction of a claim for services, and he did not intend to relinquish any claim in the agreement. The court correctly rejected these arguments.[156] The court was satisfied that Lazar did intend to relinquish his rights in an all-encompassing agreement and would not inquire into the admittedly indeterminate value of the consideration because that judgment had been made by the parties themselves.[157] Thus, Lazar's attempt to recover from the corporation failed because he expressly gave up his compensation in return for the release.

Lazar's attempt to hold Kincaid personally liable for his services also was unsuccessful. Although he won below, the court held the finding of liability clearly erroneous and reversed.[158] This aspect of the case put Lazar on the horns of a dilemma. In effect, Lazar argued that Kincaid was a corporate promoter who employed him,

---

[153]*Id.* at nn.9 & 10. *See generally* Z. CAVITCH, BUSINESS ORGANIZATIONS § 55.02[1] (rev. 1981); 1 G. HORNSTEIN, CORPORATION LAW AND PRACTICE § 94 (1959) [hereinafter cited as HORNSTEIN].

A similar problem exists when proceeds for the shares are paid back to the organizers for services. At least technically the full consideration would not have been paid. This problem has been resolved in the Model Business Corporation Act by section 22 which permits the payment of reasonable charges and expenses of organization of a corporation out of the consideration received "by it in payment for its shares without thereby rendering such shares not fully paid or accessible." 1 ABA-ALI MOD. BUS. CORP. ACT ANN § 22 [hereinafter cited as Model Act].

[154]An Indiana corporation cannot lawfully transact business until consideration of $1000 has been paid for its shares, IND. CODE § 23-1-3-5 (1976), but the determination by the board of directors of the "value" of property or services received as consideration for shares is conclusive in the absence of "actual fraud" in the transaction. *Id.* § 23-1-2-6(e).

[155]405 N.E.2d at 621.

[156]*Id.* at 620-21.

[157]*Id.* at 620. *See* Cook v. American States Ins. Co., 150 Ind. App. 88, 275 N.E.2d 832 (1971).

[158]405 N.E.2d at 621.

promising to pay with shares. This would bring the case within the general rule that a promoter is personally liable on contracts made on behalf and for the benefit of a not-yet-formed corporation even if the contract is subsequently adopted by the corporation.[159] The defendants countered that Lazar was a promoter and unlike a third party who contracts with a promoter on behalf of a projected corporation, a promoter is not entitled to compensation from co-promoters for services rendered in furthering the enterprise absent some agreement.[160] The mere relationship of promoters does not in and of itself imply a promise by some promoters to compensate others.[161] Such an agreement can be implied, but it must be specific and definite enough to warrant enforcement.[162]

Lazar was in a no-win situation. If he was a promoter, he was not entitled to compensation from co-promoters because there was no clear agreement to that effect. If he was a third party retained by a promoter, he could not recover because the presumption that the promoter, Kincaid, was personally liable[163] was effectively rebutted.[164]

Kincaid is undoubtedly correct. However, it should be a warning to persons organizing a corporation of the importance of making the rights of the parties clear so the corporation can be organized as intended, or, failing that, making it clear as to what, if any, arrangements are to be made for compensating promoters for promotional services.

F. Retaliatory Discharge

Campbell v. Eli Lilly & Co.[165] re-enforces the ukase that at will employees of Indiana businesses "blow the whistle" at career peril. In *Campbell*, the court in a split decision affirmed the Marion County Circuit Court's summary judgment for Lilly against Campbell's claim that he was discharged in retaliation for disclosing practices

---

[159]*Id.*; Mount Pleasant Coal Co. v. Watts, 91 Ind. App. 501, 506-07, 151 N.E. 7, 9 (1926). *See generally* HENN, *supra* note 152, § 111; HORNSTEIN, *supra* note 153, § 93.

[160]Hart v. Miller, 49 Del. 477, 119 A.2d 751 (1955); Bailey v. Interstate Airmotive, Inc., 358 Mo. 1121, 219 S.W.2d 333 (1949); Babbitt v. Gibbs, 150 N.Y. 281, 44 N.E. 952 (1896).

[161]Hart v. Miller, 49 Del. 477, 119 A.2d 751 (1955); Bailey v. Interstate Airmotive, Inc., 358 Mo. 1121, 219 S.W.2d 333 (1949); Babbitt v. Gibbs, 150 N.Y. 281, 44 N.E. 952 (1896).

[162]*See* Turley v. Thomas, 31 Nev. 181, 101 P. 568 (1909).

[163]*See* Stanley J. How & Assocs. v. Boss, 222 F. Supp. 936 (S.D. Iowa 1963).

[164]405 N.E.2d at 621. *See* Quaker Hill, Inc. v. Parr, 148 Colo. 45, 364 P.2d 1056 (1961).

[165]413 N.E.2d 1054 (Ind. Ct. App. 1980), *transfer denied*, 421 N.E.2d 1099 (Ind. 1981). Hunter, J., dissented from the denial of transfer. *Id.*

allegedly contrary to the federal drug regulatory scheme as implemented by the Food and Drug Administration.[166]

The majority in *Campbell* acknowledged that *Frampton v. Central Indiana Gas Co.*[167] recognizes an exception to the rule that an employer can fire an at will employee at any time.[168] Under *Frampton*, an at will employee discharged for exercising a right bestowed by statute has a cause of action against the former employer. Indiana courts, however, have refused to go beyond situations in which there is a statutory source for the right or duty the former employee was exercising[169] to protect the whistle-blowing employee.[170] Even though there may be a general duty to do that which public policy encourages or to refuse to do that which public policy forbids, this general duty is not sufficient to create an exception to the at will employment relationship.

This result is unfortunate. As Professor R. Bruce Townsend has observed, decisions such as *Martin v. Platt*,[171] denying a cause of action for retaliatory discharge, "exhibit a lack of humanitarian considerations which make bankruptcy a way of life and unionization the main tool of employee protection."[172] The employer also has rights in the employment relationship, and a large corporation should be accorded wide latitude in determining whom it will hire and fire,[173] but Indiana may go too far in protecting the interests of employers. Certainly the courts that have recognized a cause of action for retaliatory discharge apart from statutes,[174] and Judge Ratliff, who dissented in part on this issue,[175] would agree. Judge Ratliff disagreed with the view that a general public policy exception to the at will rule was a legislative matter[176] and urged the

---

[166]*Id.* at 1063. The court rejected Campbell's contention that the trial court was "biased, prejudiced and hostile" toward Campbell because of the judge's supposed antipathy towards the FDA and the federal bureaucracy in general. The argument was rejected because the majority concluded the trial court correctly applied the law. From the opinion, however, it would seem the trial court was less than judicious at times. *Id.* at 1058-59.

[167]260 Ind. 249, 297 N.E.2d 425 (1973).

[168]413 N.E.2d at 1060.

[169]The Indiana Workers Compensation Act, IND. CODE § 22-3-2-15 (1976), was the statutory basis for *Frampton*.

[170]*See* Martin v. Platt, 386 N.E.2d 1026 (Ind. Ct. App. 1979).

[171]*Id.*

[172]Townsend, *Secured Transactions, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 369, 381 (1980).

[173]*See* Percival v. General Motors Corp., 539 F.2d 1126, 1130 (8th Cir. 1976).

[174]*See, e.g.*, Petermann v. International Bd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980); Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978).

[175]413 N.E.2d at 1063-68 (Ratliff, J., dissenting).

[176]*Id.* at 1066. *See* Martin v. Platt, 386 N.E.2d 1026, 1028 (Ind. Ct. App. 1979).

court in the true common law tradition to depart from the general rule where strict adherence to "nineteenth century legal formalism and laissez faire labor policies which are not always valid in modern society"[177] creates harsh and unjust results.[178]

Judge Ratliff appears willing to protect an employee discharged for acting in compliance with judicially created public policy, but he would not go so far as to require only good faith discharges of at will employees.[179] He clearly would extend the cause of action recognized in *Frampton* to cases in which a statute does not give a right or remedy to a discharged employee but does establish a public policy that has been breached by the employer.[180] He considered Campbell as falling in this category because he alleged that his discharge was for reporting violations of the Food, Drug, and Cosmetics Act.[181] Ostensibly, at least, he was a responsible whistle-blower entitled to protection for responding to his public duty.

Judge Ratliff would limit the remedy for retaliatory discharge to damages and would not order reinstatement of the discharged employee.[182] Damages would be sufficient to deter such discharges and promote the public policy the discharge would violate. Of course, only responsible whistle-blowers could recover. One disadvantage of departing from the common law rule is that a discharged employee might contrive a "whistle-blowing" defense and at least get into court in a retaliatory discharge action. Judge Ratliff would extend the public policy exception to the at will rule, but he concurred in the result because the depositions and affidavits submitted in support of the motions for summary judgment show that Campbell was not a victim of a retaliatory discharge.[183]

Although Judge Ratliff's view may be becoming more acceptable in other jurisdictions, it clearly does not prevail in Indiana. Thus, the at will employee who wishes to blow the whistle does so at the risk of having to find new employment with no protection available under Indiana law.

---

[177]413 N.E.2d at 1063.

[178]*Id.* at 1066.

[179]*Id.* at 1066-67. *See* Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977).

[180]413 N.E.2d at 1067. *See generally* Comment, *Protecting the Private Sector at Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 Wis. L. Rev. 777, 787-88.

[181]21 U.S.C. §§ 301-392 (1976).

[182]413 N.E.2d at 1067 n.5.

[183]*Id.* at 1067-68. In fact, Campbell's complaint smacked of the irresponsible whistle blower whom no court or commentator feels should be protected. He repeatedly suggested that he was entitled to a reward of $200,000,000. *Id.* at 1068 n.6.

G. *Intercorporate Relations*

In *Ross v. Tavel*,[184] an officer-shareholder's involvement in winding up the affairs of two corporations precluded his attack on the transactions as a minority shareholder. *Ross* affirmed a judgment of the Marion County Superior Court denying the plaintiff's claim for profits of the enterprise and in funds transferred from one corporation to another where the ownership interests in the two corporations were the same.

As was the case in *Kincaid v. Lazar*,[185] the business arrangements were not well thought out although at least there was an agreement. As a consequence, Ross found himself with only a twenty percent share interest and the right to one-third of the profits of one corporation and only a twenty percent share interest in the second. He then unwisely agreed to change the arrangement to acquire one-third of the shares of both corporations. Unwisely because he gave up his right to one-third of the profits and now was attempting to recover profits earned while the business was financially healthy.[186] He was now unhappy, but unfortunately for him he had agreed to the changed relationship and so really could not complain when it turned out to his disadvantage.

Ross attacked the new arrangement for lack of consideration, alleging that neither the corporation nor one of the individual defendants had the authority to transfer shares that had been issued in his childrens' names. This argument fell before the provision of the Indiana Uniform Gifts to Minors Act which permitted the individual defendant as the custodian to transfer, sell, or dispose of the shares.[187] Only the children would have standing to complain if they were wrongfully divested of their shares.[188] He also argued that the transfer of the childrens' shares was not valid because the shares were not endorsed as required by the corporate bylaws. This attack was rejected because the shares were transferred to him upon delivery, and he had a right to have the necessary endorsement supplied under the Indiana Uniform Commercial Code.[189]

Ross also complained, as a minority shareholder, that the controlling shareholders' diversion of the assets of one corporation to the other, and subsequently to a third corporation they controlled which had lent funds to the enterprise, was fraudulent and in

---

[184]418 N.E.2d 297 (Ind. Ct. App. 1981).

[185]405 N.E.2d 615 (Ind. Ct. App. 1980) *discussed in* text accompanying note 145 *supra*.

[186]418 N.E.2d at 300-01.

[187]IND. CODE § 30-2-8-4(f) (1976 & Supp. 1981).

[188]418 N.E.2d at 302.

[189]*Id.*; IND. CODE § 26-1-8-307 (1976).

derogation of their fiduciary duties of good faith and fair dealing.[190] This attack also failed. Even if the transfer of funds was a sham designed to channel funds to the third corporation, the court concluded that Ross had been president of the two corporations and privy to the arrangement which had been designed to maximize tax benefits. Again he could not rightly complain.[191]

It is well settled that improper manipulation of funds or wrongful diversion of corporate assets by controlling shareholders creates a cause of action in favor of the corporation which can be enforced in a derivative suit.[192] It is also well settled that Indiana recognizes the principle of "incorporated partnerships" imposing on shareholders of closely held corporations fiduciary duties akin to those of partners.[193] Ross' complaint would have to sound in equity[194] and if he participated in the wrongful transfer, equity would not permit him to recover in a shareholder derivative action.[195] Of course, all this was much ado about nothing because the court concluded that the transfer of funds was proper.[196]

H. Statutory Developments

The first statutory development during the survey period of particular interest to corporate officers and directors is Public Law 211[197] which amended the provisions in the Indiana General Corporation Act[198] and the Indiana Not-For-Profit Corporation Act[199] relating to the indemnification of corporate personnel against expenses incurred in defending liability claims. The new language authorizes for profit and not-for-profit corporations to advance the litigation ex-

---

[190]418 N.E.2d at 303-04.

[191]*Id.* at 304.

[192]13 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5924 (rev. perm. ed. 1980); HENN, *supra* note 152 §§ 358, 360; HORNSTEIN, *supra* note 153, §§ 711, 716.

[193]Cressy v. Shannon Continental Corp., 378 N.E.2d 941, 945 (Ind. Ct. App. 1978); Hartung v. Architects Hartung/Odle/Burke, Inc., 157 Ind. App. 546, 552, 301 N.E.2d 240, 243 (1973). *See generally 1979 Survey*, *supra* note 62, at 150-55; Galanti, *Business Associations, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 24, 42-46 (1974) [hereinafter cited as *1974 Survey*].

[194]418 N.E.2d at 304.

[195]*Id.* Epperly v. E & P Brake Bonding, Inc., 169 Ind. App. 224, 236, 348 N.E.2d 75, 82 (1976). Even the corporation would be barred from suit if all the shareholders participated in the wrong. Gabhart v. Gabhart, 267 Ind. 370, 391, 370 N.E.2d 345, 357 (1977).

[196]418 N.E.2d at 303. The court also refused to let Ross reassert claims that had been satisfied and settled when the parties wound up the affairs of the corporations. *Id.* at 305.

[197]Act of April 15, 1981, Pub. L. No. 211, 1981 Ind. Acts 1610.

[198]IND. CODE § 23-1-2-2(b)(9) (Supp. 1981).

[199]*Id.* § 23-7-1.1-4(b)(9).

penses of corporate personnel before an action, suit, or proceeding is disposed of upon receipt of an undertaking by or on behalf of the defendant to repay the amount advanced if it is subsequently determined that he is not entitled to indemnification.[200]

It can be argued that broad corporate power to idemnify corporate personnel and to purchase director and officer insurance may reduce care in the exercise of the corporate office. However, when suits against corporate officers and directors are becoming more common, the areas of potential liability are expanding, and the costs of such litigation are escalating, most would agree that corporate personnel should have some protection against personal risk.[201] This need is emphasized by the now almost conventional wisdom that publicly held corporations should have broad-based boards of directors that include persons representing a variety of viewpoints.[202]

The most interesting thing about Public Law 211 is that once again the General Assembly apparently did not look beyond the immediate statutes involved to see if any other statute should be similarly amended. The General Assembly seems to have done the exact opposite of what was done in 1973 and 1974 when the indemnification of corporate personnel was last considered. In 1973, the General Assembly expanded the authority of Indiana general corporations and Indiana insurance companies to indemnify corporate personnel and authorized them to purchase and maintain liability insurance for their employees.[203] The General Assembly, however, did not grant an indemnification power to Indiana not-for-profit corporations until 1974.[204] Presumably this was just an oversight because if corporate personnel of general or insurance corporations are entitled to indemnification and liability insurance, so are their counterparts in not-for-profit corporations. In 1981, the General Assembly amended the Indiana General Corporation Act and the Indiana Not-For-Profit Corporation Act but not the Indiana insurance law. Certainly, if it is

---

[200]Unfortunately the general assembly did not specify who will make the ultimate determination. A court presumably could make the determination, but a decision by directors not a party to the actions, a litigation committee of the board of directors, special legal counsel or the shareholders would probably suffice. *See, e.g.*, Model Act, *supra* note 153, § 5.

[201]*See generally* ABA Committee of Corporate Laws, *Changes in the Model Business Corporation Act Affecting Indemnification of Corporate Personnel*, 36 BUS. LAW. 99, 101-02 (1980).

[202]*Id.* at 102.

[203]IND. CODE §§ 23-1-2-2(b)(9) to -2(b)(10) (1976) (General Corporation Act); *id.* §§ 27-1-7-2(b)(8) to -2(b)(9) (Insurance Law). *See generally* Galanti, *Corporations, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 77, 103-09 (1973) [hereinafter cited as *1973 Survey*].

[204]IND. CODE §§ 23-7-1.1-4(b)(9) to -4(b)(10) (1976). *See generally 1974 Survey, supra* note 193, at 54-59.

appropriate to advance the expenses of corporate personnel of general or not-for-profit corporations, it is equally appropriate to advance the expenses of corporate personnel of insurance companies. Presumably, this oversight will be remedied in the next session of the General Assembly.

Surprisingly, the General Assembly does not seem to have considered the new indemnification provision contained in section 5 of the Model Business Corporation Act.[205] Substantial changes to this provision of the Model Act were adopted by the American Bar Association Committee on Corporate Laws on June 20, 1980.[206] The new Model Act provision appears very workable. It provides appropriate protection to corporate personnel in meritorious cases while limiting the potential for abuse. Thus, the 1981 session of the General Assembly would have been an appropriate time to consider a major revision of the three indemnification provisions in the Indiana Code.

Public Law 212[207] is of interest to persons who practice as or who represent one-person professional corporations. The Act established procedures to be followed when the sole professional dies or is no longer qualified to be a shareholder. It added new sections to the four Indiana Professional Corporation Acts that provide that when a shareholder dies or becomes disqualified, "the disqualified shareholder or the personal representative of the deceased shareholder may: (1) exercise voting rights of the outstanding shares; (2) serve as a director of the corporation; and (3) serve as an officer of the corporation as appropriate for the sole purpose of dissolving the corporation . . . ."[208] This power probably could have been implied under the Acts, but it is sensible to specify clearly that steps can be taken by an unqualified shareholder or a personal representative to dissolve a professional corporation. The alternative is for the corporation to cease filing annual reports and wait for the inevitable revocation of the articles of incorporation by the Secretary of State's office after the lapse of two years. This "informal dissolution" is certainly not a procedure to be encouraged.[209]

---

[205]Model Act, *supra* note 153, § 5.

[206]ABA Committee on Corporate Laws, *Changes in the Model Business Corporation Act Affecting Indemnification of Corporate Personnel*, 36 BUS. LAW. 99-118 (1980). The initial revision to section 5 was proposed in 1979. ABA Committee of Corporate Laws, *Changes in the Model Business Corporation Act Affecting Indemnification of Corporate Personnel*, 34 BUS. LAW. 1595 (1979).

[207]Act of May 5, 1981, Pub. L. No. 212, 1981 Ind. Acts 1615.

[208]IND. CODE § 23-1-13-12 (Supp. 1981) (General Professional Corporation Act); *id.* § 23-1-13.5-7 (Professional Accounting Corporation Act); *id.* § 23-1-14-22 (Professional Medical Corporation Act); *id.* § 23-1-15-22 (Professional Dental Corporation Act).

[209]The Secretary of State probably is authorized to certify such a corporation to the Attorney General for appropriate action to dissolve. IND. CODE §§ 23-1-13-11, -14-17, -15-17 (1976).

Public Law 212 also expanded the scope of the Indiana Medical Professional Corporation Act[210] by authorizing optometrists, dentists, podiatrists, and pharmacists as well as licensed physicians to organize such corporations. Because dentists have the statutory authority to form professional dental corporations under the Indiana Professional Dental Corporation Act,[211] and the other health care professionals could form separate professional corporations under the Indiana General Professional Corporation Act,[212] the General Assembly apparently intended that members of the different professions can incorporate and operate as one facility.

Another change effected by Public Law 212, and one of questionable wisdom, was the amendment of section 23-1-2-3 of the Indiana General Corporation Act[213] which authorizes a corporation to purchase or otherwise acquire its own shares. Before it was amended, section 23-1-2-3 was identical to the pre-1979 version of section 6 of the Model Business Corporation Act.[214] The provision permits the acquisition of shares only to the extent of unreserved and unrestricted earned surplus or, under some circumstances, unreserved and unrestricted capital surplus.[215] The purpose of these and other restrictions such as the last sentence of section 23-1-2-3 which provides that "no purchase of or payment for its own shares shall be made at a time when the corporation is insolvent or when such purchase or payment would make it insolvent" are generally intended to protect the interests of creditors. The final proviso is, in fact, inherent in the corporate form itself: The owner of a corporation should not prefer himself to the disadvantage of corporate creditors.[216]

The protection afforded by this provision has been undercut by the amendment which added a new provision that nothing in the General Corporation Act shall "invalidate or otherwise affect a note, debenture or other obligation of a corporation" issued by it for a

---

[210]IND. CODE §§ 23-1-14-1 to -22 (1976 & Supp. 1981).

[211]*Id.* §§ 23-1-15-1 to -22.

[212]*Id.* §§ 23-1-13-1 to -12.

[213]*Id.* § 23-1-2-3.

[214]Model Act, *supra* note 153, § 6.

[215]Shares can be purchased from capital surplus if permitted in the articles of incorporation or approved by a vote of at least a majority of the corporation's shares.

[216]*See generally* Model Act, *supra* note 153, § 6, ¶ 2 at 253. The drafters of the Model Act apparently have now decided that creditors do not need any statutory protection and should fend for themselves. The current version of section 45 of the Model Act specifically provides that: "Indebtedness of a corporation incurred or issued to a shareholder in a distribution . . . [including a redemption] shall be on a parity with indebtedness of the corporation to its general unsecured creditors except to the extent subordinated by agreement." *See* ABA Committee on Corporate Laws, *Changes in the Model Business Corporation Act—Amendments to Financial Provisions*, 34 BUS. LAW. 1867, 1872, 1886 (1979).

share reacquisition if at the time the obligation was delivered the corporation's unreserved and unrestricted earned surplus, or the unreserved and unrestricted capital surplus as the case may be, equalled or exceeded "the amount of such note, debenture or obligation."[217]

It is possible that the new language may prevent the subordination of claims of former shareholders to the legitimate claims of creditors. This will be unfortunate because unsecured corporate creditors who do not have subordination agreements have little enough protection as it is.[218] Courts have been reluctant to favor former shareholders over creditors[219] particularly if there has been fraud or overreaching. On its face, the new provision that a note to a former shareholder is not invalidated by a subsequent bankruptcy would seem to favor a dishonest former shareholder over innocent crediters. It is to be hoped that Indiana courts in construing amended section 23-1-2-3 will not reach such an unjust result and would still subordinate claims when there is evidence of fraud or overreaching.

Admittedly, the new provision will make it easier for small corporations to repurchase shares on an installment basis if shareholders no longer need fear inferior status. Of course, creditors might well become frustrated and either insist on subordination agreements or simply decline to extend extra credit.[220]

There is something commendable about efforts to simplify corporate procedures, particularly as to notices and other documents that must be filed with the Secretary of State, but Public Law 213[221] probably went too far. Among other things it amended numerous sections of the Indiana General Corporation Act and the Indiana Not-For-Profit Corporation Act by substituting the requirement that notices and other documents be "signed by any current officer of the corporation and verified and affirmed subject to penalties for injury," for the previous requirement that notices or documents be "signed and verified under oath by its president or a vice president and its secretary or an assistant secretary."

The traditional two signature requirement has the advantage of reducing the chance that an officer will exceed his or her authority.

---

[217]IND. CODE § 23-1-2-3 (Supp. 1981). *See also* CONN. GEN. STAT. ANN. § 33-358 (West Supp. 1981); DEL. CODE ANN. tit. 8, §§ 610, 612 (1974).

[218]*See generally* 10 LOY. L.A.L. REV. 254 (1976).

[219]*See, e.g.*, Robinson v. Wangemann, 75 F.2d 756, 757 (5th Cir. 1935); *but see* Williams v. Nevelow, 513 S.W.2d 535, 537-38 (Tex. 1974).

[220]*See In re* National Tile & Terrazzo Co., 537 F.2d 329, 333 (9th Cir. 1976) (Goodwin, J., dissenting).

[221]Act of April 16, 1981, Pub. L. No. 213, 1981 Ind. Acts 1620. Certain minor housekeeping amendments were made by Public Law 213. *See, e.g.*, IND. CODE § 23-1-11-6 (Supp. 1981).

However, because it is now possible to have an Indiana corporation with one director regardless of the number of shareholders,[222] there is probably no reason for requiring the president and the secretary of a corporation to execute such routine forms as, for example, a certificate changing the resident agent or principal office of a corporation[223] or even articles of amendment or amended articles of incorporations.[224]

It appears that the General Assembly got carried away with its simplifying bent. Even assuming that articles of merger or consolidation are routine documents that do not need two signatures as a practical matter,[225] one may well question the wisdom of permitting any corporate officer to execute the *agreement* of merger or consolidation which is the document setting out the terms of the transaction. This is now permitted under the General Corporation and Not-For-Profit Corporation Acts as amended by Public Law 213.[226] In fact it is no longer necessary to affix the corporate seals of the merging or consolidating corporations to the agreement.

This newly authorized procedure may not cause any problems with mergers or consolidations of Indiana corporations. It is conceivable, however, that officials in other jurisdictions where a copy of the agreement has to be filed might question the validity of an agreement of merger or consolidation which bears the signature of only one officer and no corporate seal. Cautious corporate attorneys will probably avoid potential problems by having merger or consolidation agreements attested to by the secretary or an assistant secretary and by affixing the corporate seal.

It is possible that the General Assembly did not really intend to change the long established procedure for executing corporate agreements but inadvertently amended the provisions because the language was similar to the language pertaining to executing forms filed with the Secretary of State. If the change was simply a case of legislative momentum, the relevant sections of the Acts[227] should be amended again during the next session.

Public Law 213 made other changes to Indiana corporation statutes. Annual reports of all corporations, general or not-for-profit, domestic or foreign, must now contain "a statement of whether the

---

[222]IND. CODE § 23-1-2-11(b) (Supp. 1981).

[223]*Id.* § 23-1-2-5.

[224]*Id.* § 23-1-4-5. Delaware still requires two signatures. DEL. CODE ANN. tit. 8, § 103(a)(2) (1974).

[225]IND. CODE §§ 23-1-5-2(f), -3(3), -7-1.1-42(e) (Supp. 1981).

[226]*Id.* This procedure might make more sense for short form mergers where a parent can merge a ninety-five percent owned subsidiary into itself without shareholder approval. *Id.* § 23-1-5-8.

[227]*Id.* §§ 23-1-5-2(f), -3(e), -8, -7-1.1-42(e) (Supp. 1981).

corporation is the holder of any funds or other property, tangible or intangible, which may be presumed abandoned pursuant to the provisions . . . ."[228] of the Indiana Uniform Disposition of Unclaimed Profits Act.[229]

Public Law 213 also clarified the procedures for forfeiting the articles of incorporation of domestic and certificates of admission of foreign corporations that have not filed annual reports for two consecutive years by requiring the Attorney General to proceed against them "upon certification of such fact by the Secretary of State."[230] The procedures for the Secretary of State's administrative revocation of the rights and privileges of domestic[231] and foreign[232] corporations failing to file annual reports were also revised.

Finally, Public Law 213 made some changes in the Indiana Medical Professional Corporation and Dental Professional Corporation Acts by requiring the incorporators to obtain a certificate of registration from the applicable regulatory board and to present it to the Secretary of State before he can issue the certificate of incorporation.[233] Unfortunately, the amendments to section 23-1-14-8 of the Medical Professional Corporation Act do not reflect the changes effected by Public Law 212 permitting optometrists, dentists, podia-

---

[228]*Id.* §§ 23-1-8-1(7), -11-7(14), -3-4-1(a)(7), -7-1.1-36(m).

[229]*Id.* §§ 32-9-1-1 to -45.

[230]*Id.* § 23-1-10-1(b).

[231]*Id.* § 23-3-4-1(c)(1). For domestic corporations the Secretary of State must give 30 days notice by first class mail addressed to the resident agent at his last address on file, or to the last known address of the corporation if no address of the resident agent is on file. If the required filings are not made within 30 days, the Secretary of State must publish notice in a newspaper of general circulation in the county in which the corporation's principal office is located. The Secretary of State is required to revoke the rights and privileges and declare forfeited the articles of incorporation of a domestic corporation which fails to file the reports within the 30 days following the required publication. *Id.*

[232]*Id.* § 23-3-4-1(c)(2). For foreign corporations, the Secretary of State must give 30 days notice by first class mail addressed to the resident agent at his last address on file, or at the last known address of the corporation outside the state if no address of the resident agent is on file. If the required filings are not made within 30 days, a second notice must be sent by first class mail to the last known address of the corporation outside the state. If the required filings are not made within 30 days of the second mail notice then the Secretary of State is required to revoke the rights and privileges and declare forfeited the certificate of admission of the non-complying foreign corporation. *Id.*

[233]*Id.* § 23-1-14-8 (Medical Professional Corporations Act), § 23-1-15-8 (Dental Professional Corporations Act). A medical professional corporation must now file certified copies of its articles of incorporation, amendments to articles of incorporation, and all articles of mergers with the regulating board. *Id.* § 23-1-14-20. For some reason section 23-1-15-20 pertaining to dental professional corporations was not similarly amended. *Id.* § 23-1-15-20.

trists, and pharmacists to organize as medical professional corporations.[234]

The General Assembly in Public Law 214[235] deleted as an *exception* from the definition of sales and purchases in the Indiana Securities Act "any act incident to a class vote by stockholders, pursuant to the articles of incorporation or the applicable corporation statute, on recapitalization or reclassification of securities . . . ."[236] At the same time it added a new *exemption* from the registration requirements of the Act that covers basically the same type of transactions.[237] The effect of this amendment is that instead of totally exempting such transactions from the Act because they are not within the definition of a sale or purchase, they are now subjected to the antifraud provisions and to the registration provision if the Securities Commissioner decides registration is appropriate. This was a worthwhile change.

The Indiana Business Takeover Offers Act[238] adopted in 1979 was amended in several respects by Public Law 215.[239] Most of the changes seem aimed at insulating the Act from constitutional challenge. The success of this tactic depends entirely on the Supreme Court's resolution of the challenge to the Illinois Takeover Act in *Mite Corp. v. Dixon*.[240] If the Illinois statute is upheld, the Indiana Act is valid. If the Illinois Act falls, the Indiana effort will fail. This is true notwithstanding that a self-serving "intent and purpose section" was added to the Act.[241] The problem with most state takeover

---

[234]Act of May 5, 1981, Pub. L. No. 212, 1981 Ind. Acts 1615.

[235]Act of May 6, 1981, Pub. L. No. 214, 1981 Ind. Acts 1683. Certain housekeeping amendments were made to the Indiana Securities Act, IND. CODE §§ 23-2-1-1 to -24 (1976 & Supp. 1981), and certain filing fees were increased by Public Law 214. It also made the failure of a corporate officer or director to send a corporation's most recent annual financial statement to a shareholder within a reasonable time of a request for the statement a Class B infraction. *Id.* § 23-1-10-3(b)(3) (Supp. 1981).

[236]IND. CODE § 23-2-1-1(i)(8)(iii) (1976).

[237]*Id.* § 23-2-1-2(b)(16) (Supp. 1981). The new language exempts:

> [A]ny issuance of securities to or for the benefit of stockholders incident to a vote by such stockholders pursuant to the articles of incorporation or applicable instrument, on a merger, consolidation, reclassification of securities, or sale of corporate assets in consideration of the issuance of securities of the same or another corporation or trust; if the commissioner is notified in writing of all terms of the transaction and does not disallow the exemption with the next five (5) full business days.

[238]*Id.* §§ 23-2-3.1-1 to -11 (Supp. 1981). *See generally 1979 Survey, supra* note 62, at 161-72.

[239]Act of April 24, 1981, Pub. L. No. 215, 1981 Ind. Acts 1700.

[240]633 F.2d 486 (7th Cir. 1980), *prob. juris. noted sub nom.* Edgar v. Mite Corp. , 101 S.Ct. 2043 (1981).

[241]IND. CODE § 23-2-3.1-0.5 (Supp. 1981). The section provides:

> (a) The general assembly finds that it is often difficult for corporate shareholders to obtain sufficient information to make an informed and

statutes is that they tend to display a pro-management tilt that conflicts with the balanced approach to takeovers reflected in the Williams Act.[242] This is not surprising because the motivating force behind the state statutes are potential targets of tender offers, not potential offerors. The latter group certainly does not want another layer of regulations applied to their acquisition efforts.

In some respects the amendments reduce the pro-management tilt of the Indiana Act. For example, a general requirement that a tender offer is proper unless after a hearing the Securities Commissioner finds "by a preponderance of the evidence that the takeover statement fails to provide full and fair disclosure to the offerees of all material information concerning the takeover offer" has been substituted for the previous language which authorized the Commissioner to bar a tender offer where he found it was "unfair or inequitable to the holders of the securities of the target company . . . ."[243] Thus, the Indiana Act is now a "disclosure" statute that the drafters hope will be compatible with the disclosure philosophy of the Williams Act. Of course, if the philosophies are the same, one might wonder why Indiana has a Takeover Offers Act other than as a means of harassing offerees in order to protect "Hoosier corporations."[244]

To be fair, it must be noted that an antifraud provision has been added to the Takeover Offers Act[245] which would apply to target company management as well as to offerees. In this respect, the Act may be a decided improvement over the Williams Act where a defeated tender offeree has no cause of action for damage against the target company which has made false and misleading statements

---

timely decision when faced with the questions of accepting or rejecting a takeover offer.

(b) By enacting this chapter, it is the intent and purpose of the general assembly to provide for full and fair disclosure of all material information concerning takeover offers to shareholders of Indiana corporations, so that the opportunity of each shareholder to make an informed and well-reasoned investment decision may be secured. It is the purpose of the general assembly to provide for adequate disclosure in a manner consistent with the constitutions of the United States and of Indiana.

[242]*See* Mite Corp. v. Dixon, 633 F.2d 486, 493-94 (7th Cir. 1980), *prob. juris. noted sub nom.* Edgar v. Mite Corp., 101 S.Ct. 2043 (1981); Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1278-80 (5th Cir. 1978), *rev'd on other grounds sub nom.* Leroy v. Great Western United Corp., 443 U.S. 173 (1979).

[243]IND. CODE. § 23-2-3.1-7(a) (Supp. 1981).

[244]See notes 117 & 118 *supra.*

[245]IND. CODE § 23-2-3.1-8.5 (Supp. 1981). This provision is similar to the antifraud provision in the pre-1979 takeover act. IND. CODE § 23-2-3-4 (1976) (repealed 1979).

during the contest.[246] This assumes, of course, that a cause of action is implied by the courts. This may be assuming too much.

Certain transactions were excluded from the definitions of takeover offers when the Act was adopted in 1979.[247] These exclusions included ordinary brokerage transactions, de minimis offers or acquisitions not exceeding two percent of the class within the preceding twelve months, acquisition of its own shares by a target company, and transactions determined by the Securities Commissioner to be takeover offers not having or intended to have the effect of changing or influencing the control of the target corporation. These exclusions were repealed by Public Law 215 and replaced, except for the brokerage exclusion, by a new provision that exempts the transactions from the substantive requirement of the Act but not the newly adopted antifraud provision.[248] Interestingly, the brokerage exclusion which was the basis of the Indiana Court of Appeals decision of *In re City Investing Co.*[249] was not carried over.

For a legislature that ostensibly is concerned with shareholder interests, it is somewhat surprising to see that the number of shareholders that will trigger the disclosure requirements of the Act has been increased from fifty to seventy-five.[250] The antifraud provision is the only protection these shareholders have under the amended Act.

Tender offers for Indiana insurance companies have been discouraged. Previously such takeover efforts were not subject to the Act if the acquisition required the approval of the Insurance Commissioner. Now, approval by both the Insurance and the Securities Commissioners are required.[251] Procedures for hearings on a takeover offer were revised by Public Law 215.[252] The expenses of any hearings have been placed on the offeror, who may be required to post bond.[253] Five days notice of the hearing on a takeover offer, which hearing must be held within twenty business days of the filing of a disclosure statement, is now required.[254] However, the Commis-

---

[246]Piper v. Chris-Craft Indus. Inc., 430 U.S. 1 (1977). Then again, it may be nothing more than an attempt to bring offerors like City Investing and GDV under the Takeover Offer Act. See text accompanying notes 101-14 *supra*.

[247]IND. CODE § 23-2-3.1-1(i)(1)-(4) (Supp. 1980) (repealed 1981).

[248]*Id.* § 23-2-3.1-8.6 (Supp. 1981).

[249]411 N.E.2d 420 (Ind. Ct. App. 1980). See text accompanying notes 55-114 *supra* for a discussion of *City Investing*.

[250]*Compare* IND. CODE § 23-2-3.1-1(j)(5) (Supp. 1980) (repealed 1981) *with id.* § 23-2-3.1-8.6(a)(3) (Supp. 1981).

[251]*Compare id.* § 23-2-3.1-1(j)(1) (Supp. 1980) (repealed 1981) *with id.* § 23-2-3.1-7(e) (Supp. 1981).

[252]*Id.* §§ 23-2-3.1-7(b) to-7(e) (Supp. 1981).

[253]*Id.* § 23-2-3.1-7(c).

[254]*Id.* §§ 23-2-3.1-7(a) to-7(b).

sioner can now issue ex parte cease and desist orders without notice.[255]

At least one major problem with the Takeover Offers Act was eliminated by the repeal of section 23-2-3.1-6[256] which prohibited takeover offers from becoming effective for at least fifteen business days after the filing of the offeror's statement. This provision was probably in direct conflict with SEC Rule 14d-2(b)[257] which requires a tender offer to commence within five day of its public announcement.

The last significant amendment effected by Public Law 215 was the substitution of a new section 23-2-3.1-9(c)[258] which now provides "that neither the secretary of state, nor the securities commissioner, nor any employee of the securities division shall be liable in their individual capacity, except to the state of Indiana, for any act done or omitted in connection with the performance of their respected duties . . . ." under the the Takeover Offers Act. This provision will take care of damage suits by unhappy tender offerors[259] or Indiana shareholders if by some chance opposition by the Securities Commissioner causes an offeror to withdraw a lucrative tender offer.

---

[255] *Id.* § 23-2-3.1-10(a).

[256] IND. CODE § 23-2-3.1-6 (Supp. 1980) (repealed 1981).

[257] 17 C.F.R. § 240.14d-2(b) (1981).

[258] IND. CODE § 23-2-3.1-9(c) (Supp. 1981).

[259] *See* City Investing Co. v. Simcox, 633 F.2d 56, 59 n.7 (7th Cir. 1980).

III. Civil Procedure and Jurisdiction

WILLIAM F. HARVEY*

A. *Introduction*

This survey is limited to a discussion of those cases and amendments to rules which were distinctive in the year reviewed. The survey period saw major changes in the Trial Rules and the Appellate Rules. For the first time, the Supreme Court of Indiana adopted an extensive Original Action Rule, and it amended several of the Small Claims Rules. The Supreme Court of Indiana, upon recommendation of the court's Standing Committee on Rules of Practice and Procedure, amended the following rules effective January 1, 1981: Trial Rules 24, 30, 53.4, 59, and 60 and Appellate Rules 8.1 and 12. Additionally, Small Claims Rules 2, 3, 5, 10, and 11 were amended. Finally, the Original Action Rule, which is divided into six discrete rules, is accompanied by four forms.

Each of the Trial Rules was supported by Committee notes which explained the amendments. Several of those amendments and the attendant notes as well as the Rule on Original Action are discussed in this Article and appear where the subject area is reviewed. The Small Claims Rules are not reviewed.

B. *Jurisdiction, Process, Venue, Standing, and Claims in General*

1. Jurisdiction.—The principal decision which interpreted Indiana's Trial Rule 4.4 in this reporting period was the California decision of *Indiana Insurance Co. v. Pettigrew.*[1] In *Pettigrew*, an Indiana judgment was enforced pursuant to the full faith and credit clause. The judgment was rendered in a case brought against the defendant because the defendant's minor son, Michael, was involved in a multi-

---

*Carl M. Gray Professor of Law and former Dean, Indiana University School of Law—Indianapolis. A.B., University of Missouri, 1954; J.D., Georgetown University, 1959; LL.M., Georgetown University, 1961. The author wishes to extend his appreciation to S. Andrew Bowman for his assistance in the preparation of this Article.

[1]114 Cal. App. 3d 732, 171 Cal. Rptr. 770 (1981). In Barker v. Barker, 94 N.M. 162, 608 P.2d 138 (1980), the Supreme Court of New Mexico enforced an Indiana judgment which was obtained ex parte by a former wife in Indiana and which granted a monetary award against her former husband. The husband argued in the New Mexico court that the Indiana judgment was invalid and not entitled to recognition and full faith and credit. The New Mexico court sustained the Indiana judgment and held that because the husband lived in Indiana from March 1970 to October 1974, there was a sufficient contact with Indiana to sustain personal jurisdiction under Trial Rule 4.4(A)(7) even when the Indiana judgment was ex parte. Adequate notice of the proceeding was given to the husband who received a copy of the complaint and summons by registered mail, and a return receipt was signed by the husband.

ple-car collision in Indiana while driving the defendant's car. The insurance company settled the insured's claims, and pursuant to subrogation provisions in the insurance agreement, it instituted an action against Michael and his father in Indiana. At all relevant times both defendants were California residents. The Indiana complaint alleged negligence by the defendant's son and asserted liability against the father who owned the motor vehicle driven by the son. Both defendants were served by certified mail from the Indiana state court; they defaulted in the Indiana action, and judgment was entered.[2]

In enforcing the Indiana judgment, the California court held that Indiana had a nonresident motor statute which provides jurisdiction over the nonresident operator or "his duly authorized agent."[3] Under this provision, the California court observed that an agency relationship was required and that there was no agency relationship between the father and his son. However that may have been, the California court held that under its statutory law an extension of jurisdiction over the owner of an automobile who merely extends permission to another driver to operate in the state of California creates an "agency" in California.[4] The California court stated that the California motor vehicle statute, which imposes a form of vicarious liability, created a sufficient type of "agency" to satisfy the extension of jurisdiction over the defendant pursuant to Indiana's nonresident motorist law.[5]

The California court also concluded that jurisdiction was properly asserted over the California defendant under Indiana's long arm statute, Trial Rule 4.4(A)(2).[6] The California court concluded that

---

[2]114 Cal. App. 3d at 733, 171 Cal. Rptr. at 770-71.

[3]*Id.* at 733, 171 Cal. Rptr. at 771. IND. CODE § 9-3-2-1 (Supp. 1981) provides in part:

> The operation by a nonresident, or by any resident of this state who may thereafter become a nonresident of this state, or by his duly authorized agent, of a motor vehicle upon a public street or highway or any other place within this state shall be deemed equivalent to an appointment by such person of the secretary of state, or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him . . . .

[4]114 Cal. App. 3d at 733, 171 Cal. Rptr. at 771.

[5]*Id.*

[6]*Id.* at 734, 171 Cal. Rptr. at 772-73. IND. R. TR. P. 4.4(A)(2) provides that there is a basis of jurisdiction in an Indiana state court for: "(2) causing personal injury or property damage by an act or omission done within this state . . . ." The United States Court of Appeals in City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979), was much less clear about IND. R. TR. P. 4.4(A)(2) than the California court and held that it could not "determine whether the Indiana courts will conclude that this phrase includes only acts physically done within the state or also includes acts physically done outside the state but causing some injury within it; either construction is possible." 604 F.2d at 1020-21.

when the defendant gave his son permission to drive the defendant's car in Indiana, those acts, which occurred in California, were sufficient as acts "causing personal injury and property damage" within Indiana. Accordingly, the California court enforced the Indiana judgment and found that the Indiana court had jurisdiction based upon its two statutory provisons.[7]

The case of *State ex rel. Long v. Marion County Superior Court*[8] was an original action for a writ of mandamus. It was filed after a petition for the dissolution of marriage was filed in the Hamilton County Superior Court. The other spouse filed a petition in the Marion County Superior Court later in the same day. Service was effected from the Marion County suit first.[9]

The Indiana Supreme Court held that exclusive jurisdiction over the particular claim for relief vested when the complaint or other equivalent pleading or document was filed pursuant to Trial Rule 3.[10] The court concluded that the Hamilton County Superior Court had exclusive jurisdiction because that action was commenced first, regardless of when the summons was served.[11]

2. Power and Duty to Entertain Complaint.—In *Stanton v. Godfrey*,[12] an Indiana trial court awarded attorney's fees to a nonprofit legal organization. The demand for those fees arose from a claim in the state court filed because a previous federal court decision had determined that certain AFDC benefits were improperly withheld by the State of Indiana. Attorney's fees in this litigation were awarded pursuant to 42 U.S.C. § 1988,[13] and on appeal the state argued that the award was improper.[14]

The Indiana Court of Appeals held that an action under section 1983[15] for the vindication of all statutory rights within the ambit of all federal laws could be brought in the Indiana state court and that, of course, the federal statute was not limited to "classical" civil

---

[7]114 Cal. App. 3d at 735, 171 Cal. Rptr. at 773.

[8]418 N.E.2d 218 (Ind. 1981).

[9]*Id.* at 219.

[10]*Id.* (citing Barber-Greene Co. v. Blaw Knox Co., 239 F.2d 774, 778 (6th Cir. 1956)).

[11]418 N.E.2d at 220.

[12]415 N.E.2d 103 (Ind. Ct. App. 1981).

[13]42 U.S.C. § 1988 (1976) provides:

> In any action or proceeding to enforce a provision of §§ 1981, 1982, 1983, 1985, and 1986 of this title, Title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

[14]415 N.E.2d at 105.

[15]42 U.S.C. § 1983 (1976).

rights claims.[16] Thus, a claim of right arising under the Social Security Act could be vindicated consistent with section 1983. The Indiana court also held that 42 U.S.C. § 1988 applied to all types of section 1983 actions including those based solely on Social Security Act violations or other federal statutory law.[17] The court concluded that the Indiana department of public welfare was a "person" within the meaning of section 1983 and that local governments and local governmental officials are "persons" within the meaning of that provision.[18] The Indiana decision is consistent with cases from the United States Supreme Court, specifically *Maine v. Thiboutot*,[19] *Maher v. Gagne*,[20] and *Martinez v. California*.[21]

Finally, the court of appeals appeared to hold that attorney's fees should be awarded to a non-profit legal organization without a reduction equal to the amount of payments acquired from sources other than the plaintiffs in the present action.[22]

3. Claims in General: Suits under Trial Rule 60 and the 1981 Amendment to Trial Rule 60.—The 1981 amendment to Trial Rule 60(B)[23] struck the word "proceeding" from the rule because that word could have been interpreted as meaning that the trial rule was applicable to an interlocutory order. By striking the word "proceeding" and inserting the words "final order," it is now clear that Trial Rule 60(B) does not apply to interlocutory orders.[24]

In *Keiling v. McIntire*,[25] a default judgment was entered against the defendant, and the defendant moved to set the judgment aside under Trial Rule 60(B)(1). The defendant's evidence showed that the defendant was not served with summons or process.[26]

---

[16]415 N.E.2d at 106-07.

[17]*Id.* at 107-08.

[18]*Id.* at 107.

[19]448 U.S. 1 (1980).

[20]448 U.S. 122 (1980).

[21]444 U.S. 277 (1980).

[22]415 N.E.2d at 108.

[23]IND. R. TR. P. 60(B) now provides in part that on motion and upon such terms as are just, the court may relieve a party or the party's legal representative from an entry of a default, final order, or final judgment, including a judgment by default.

[24]The Supreme Court Rules Committee Note on Footnote 22 provided:

> The first sentence of Sec. (B) is amended and the amendment is necessitated in part by the possible construction of Trial Rule 60(B) in its present form which would permit, pursuant to Trial Rule 60(C), a direct appeal from a denial of Trial Rule 60(B) relief sought against an interlocutory order. Pathman Const. Co. v. Drum-Co Engin. Corp., (1980)—Ind.App.—402 N.E.2d 1. The word "proceeding" has been deleted because a party does not seek relief from a proceeding but from an order or a judgment.

[25]408 N.E.2d 565 (Ind. Ct. App. 1980).

[26]*Id.* at 566.

The court of appeals held that a Trial Rule 60(B)(1) motion is proper to set aside a judgment taken against a person who has neither been served with process nor received notice of the institution of the action against him.[27] The court also stated that "service" in this context means compliance with Trial Rules 4.4 -4.17.[28] When a defendant has not been served pursuant to those provisions, such an omission is a *jurisdictional defect*, and it is unnecessary to show that there is a meritorious defense to the action against the defendant. Otherwise, as was shown in *Sanders v. Kerwin*,[29] when a defendant has been served and has defaulted, it is necessary to show that not only was the notice of the action inadequate (or some other basis for relief under this motion), but also that there is a meritorious defense to the suit before the default judgment can be set aside.

4. Computation of Time, Service of Process, and Service on Attorneys.—Trial Rule 6(E)[30] provides that three days shall be added to a prescribed period of time when service is made by mail. In *Erdman v. White*,[31] the court of appeals held that Trial Rule 6(E) had no application when a party was represented in open court by counsel and when that counsel was notified about a court decision or ruling in open court even though out-of-state counsel is notified by mail.[32] The court held that when local counsel was present and when a trial court's order was read, the notification was effective and that the additional three days provided in Trial Rule 6(E) does not accrue to the benefit of a party.[33]

---

[27]*Id.*

[28]*Id.* at nn.1 & 2.

[29]413 N.E.2d 668 (Ind. Ct. App. 1980) (there was a question here about the adequacy of notice). In Brendonwood Common v. Kahlenbeck, 416 N.E.2d 1335 (Ind. Ct. App. 1981), the parties did not receive notice of the entry of a final injunction, and the time for filing a Trial Rule 59 motion had expired. The losing party filed a motion for relief under Trial Rule 60(B) which the trial court denied and that denial was affirmed on appeal. The appellate court reasoned that a duty was imposed on counsel of record under Trial Rule 72(D) to check the records of the court for the entry of judgment, and if counsel failed to do so, then counsel could not make a sufficient evidentiary showing of entitlement to relief under Trial Rule 60(B). That motion is addressed to the discretion of the trial court, and diligence on counsel's part is required. The opinion seems to be contrary to Soft Water Utilities, Inc. v. LeFevre, 261 Ind. 260, 301 N.E.2d 745 (1973), and there was a strong dissent by Judge Sullivan.

[30]IND. R. TR. P. 6(E) provides that:

> [w]henever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three [3] days shall be added to the prescribed period.

[31]411 N.E.2d 653 (Ind. Ct. App. 1980).

[32]*Id.* at 656.

[33]*Id.*

Trial Rules 4.9[34] and 4.13[35] were interpreted in the case of *Abell v. Clark County Department of Public Welfare*.[36] In *Abell*, the department attempted to terminate certain parental rights to the defendant's three children. Before this action commenced, the defendant consented to make the children wards of the department; thus the department was familiar with the defendant. Process was served, however, by publication which was supported by an affidavit from the director of the department stating that the current residence of the defendant was unknown and could not be ascertained. A default judgment was entered which the defendant attacked on direct appeal.[37]

The court of appeals held that process in a proceeding to terminate parental rights is basically an *in rem* proceeding governed by Trial Rule 4.9 which permits service by publication to be effected pursuant to Trial Rule 4.13. The court added, however, that service must be made in the best possible manner reasonably calculated to inform the respondent of a pending action and consistent with the fundamental principles of due process of law.[38] The court held that service of process was not reasonably calculated to inform this defendant under the circumstances and ordered a new hearing.[39]

Trial Rule 5(B)[40] provides that when a party is represented by an attorney, service shall be made upon the attorney. This rule was interpreted in *Solar Sources v. Air Pollution Control Board*.[41] In this case the Pollution Control Board notified Solar's *attorney* about the Board's final determination in a dispute with Solar Sources. A review statute provided that if appeal was to be taken then it shall be taken fifteen days after receipt of notice by the person or persons against whom an order has been entered. An appeal by Solar Sources was not taken in the fifteen day period after notification given by the Board to Solar's attorney. The trial court entered a summary judgment for the Board.[42] The Indiana Court of Appeals held that notice to the attorney was insufficient and that Trial Rule

---

[34]IND. R. TR. P. 4.9 provides the method for service of summons in actions in rem.

[35]IND. R. TR. P. 4.13 provides that summons may be served by publication and dicates the method for the publication. This trial rule is referred to in Trial Rule 4.9.

[36]407 N.E.2d 1209 (Ind. Ct. App. 1980).

[37]*Id.* at 1210.

[38]*Id.* (citing Robinson v. Hanrahan, 409 U.S. 38 (1972); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)).

[39]407 N.E.2d at 1211.

[40]IND. R. TR. P. 5(B) states in part that whenever a party "is represented by an attorney of record, service shall be made upon such attorney unless service upon the party himself is ordered by the court."

[41]409 N.E.2d 1136 (Ind. Ct. App. 1980).

[42]*Id.* at 1137.

5(B) was inapplicable in determining the time period of notification to the attorney because, pursuant to Trial Rule 1, the trial rules did not apply to the review of an administrative agency decision.[43]

The reasoning of the court of appeals in *Solar Sources* appears to be flawed. The court reasoned that Indiana Code section 4-22-1-6[44] provides that notice shall be in writing and delivered by registered or certified mail, return receipt requested, and addressed to the person or persons against whom an order or determination may be made, either at their last known place of business or residence. The court then reasoned that the Indiana Supreme Court decision in *Ball Stores, Inc. v. State Board of Tax Commissioners*,[45] was not controlling because, according to the court of appeals, the *Ball Stores* decision represented a holding that when an administrative procedure statute fails to specify some detail, the courts must then look to the Indiana Rules of Trial Procedure to supply the missing rule.[46] The court of appeals seemed to either hold that the trial rules are inapplicable when the administrative procedure statute fails to specify some detail or to reason that there was sufficient detail in the Administrative Adjudication Act on service to a party to obviate the application of Trial Rule 5(B).

In this writer's judgment, there is no conflict between the Administrative Adjudication Act in its section 6 provision for service upon a person and the Trial Rule 5(B) provision for service upon the attorney of a person who is represented in a proceeding. There is no language in either section 14 or section 6 of the Administrative Adjudication Act which excludes the application of Trial Rule 5(B), and the court of appeals in the opinion did not indicate that there was such language. The court concluded that section 6 must be literally interpreted.[47] This result means, of course, that one who is to be

---

[43]*Id.* at 1138.

[44]IND. CODE § 4-22-1-6 (1976) provides in part for notice as follows:

In all cases in which the agency is the moving party it shall give at least five (5) days' notice in writing by registered or certified mail with return receipt requested, addressed to the person or persons against whom an order or determination may be made at their last known place of residence, or place of business, which notice shall set forth therein a sufficient statement of the matters of fact or law to advise such person of the matters in issue and to be heard or determined by said agency, together with notice of the time and place of such hearing. Said statement may be informal and need not conform to the requirements of a pleading in court. Whenever the hearing involves the claim, averment or complaint of, or is made by, a private person, a copy or the substance thereof shall be included in or exhibited with such notice.

[45]262 Ind. 386, 316 N.E.2d 674 (1974).

[46]409 N.E.2d at 1138.

[47]*Id.* at 1139.

served with notice pursuant to the Administrative Adjudication Act cannot enjoy or receive the assistance of counsel to represent that person insofar as effective notification is concerned. Furthermore, the opinion in *Solar Sources* was not reconciled with the Indiana Supreme Court decision in *Ball Stores*.

5. *Service of Process and "John Doe" Complaints.*—In *Maclin v. Paulson*,[48] a complaint was brought against the Chief of Police of Gary, Indiana, and several unnamed police officers. The complaint alleged that they had either participated in or had permitted the beating of the plaintiff while the plaintiff was held in custody in the Gary jail. The complaint listed several police officers as "John Doe, Defendants." Service of process was effected pursuant to Federal Rule of Civil Procedure 4(d)(1) by serving summonses upon the Gary Police Department.

The United States District Court dismissed the complaint on the ground that the service of the summonses was insufficient.[49]

The United States Court of Appeals for the Seventh Circuit reversed and held that in this civil rights action filed under 42 U.S.C. § 1983, the use of fictitious names for the defendants was approved.[50] The court held that when a party is ignorant of a defendant's true identity, it is not necessary that the party name that defendant or those persons until their identity can be learned through discovery or through the aid of the trial court.[51] Moreover, the court of appeals held that there was no statute of limitations problem because the unidentified members of the police department were put on notice of the action when service of the complaint and summons were effected upon the offices of the Gary Police Department before the statute of limitations had run.[52] Accordingly, the Seventh Circuit sustained the use of the "John Doe" complaint and its service by general service upon the department or place where a prospective defendant works or is known to be employed.

6. *Venue and Change of Venue.*—Trial Rule 75(B)[53] was inter-

---

[48]627 F.2d 83 (7th Cir. 1980).

[49]*Id.* at 84-86.

[50]*Id.* at 87.

[51]*Id.*

[52]*Id.* at 88 & n.6.

[53]IND. R. TR. P. 75(B) provides as follows:

(B) **Claim or proceeding filed in improper court.** Whenever a claim or proceeding is filed which should properly have been filed in another court of this state, and proper objection is made, the court in which such action or proceeding is filed shall not dismiss the same, but shall order said cause transferred to the court in which it should have been filed. The person filing such claim or proceeding shall pay such costs as are chargeable upon a change of venue and the papers and records shall be certified to the court of transfer in like manner as upon change of venue. Such action shall be deemed commenced as of the date of filing the claim in the original court.

preted in the case of *Elliott v. Roach*.[54] The Indiana Court of Appeals held that if a trial court lacks jurisdiction over a dispute which is brought before it, then pursuant to this trial rule a trial court can transfer that case to a correct court for an appropriate remedy.[55] Thus, if the Indiana trial court is confronted with a choice of either dismissal or transfer, which includes the instance in which the trial court lacks subject matter jurisdiction, the trial court can transfer the case pursuant to Rule 75(B) to a trial court with a proper jurisdictional foundation.

A question was raised concerning the constitutionality of Trial Rule 76[56] in the decision of *Piwowar v. Washington Lumber & Coal Co.*[57] In this dispute an action was brought in Lake County, Indiana, because of an injury allegedly caused by a defective nail which splintered and injured the plaintiff's eye. The action was venued to the Porter County Circuit Court and tried there by a jury. The plaintiff claimed that Trial Rule 76 was unconstitutional principally because it deprived the plaintiff of trial by jury pursuant to the "demographic composition of Lake County."[58]

The court of appeals found no such constitutional infirmity in Trial Rule 76.[59] The court held that the automatic change of venue in Trial Rule 76 is "designed to provide a fair and impartial trial to all parties and to prevent protracted litigation" and that those elements are "not outweighed by the inconvenience and expense to the plaintiff which might be caused by a venue change."[60] The court also commented that there was no evidence in the record concerning the "demographic compositon of Lake County" and therefore an insufficient basis upon which to raise this type of challenge to Trial Rule 76.[61]

C. *The 1981 Original Action Rule*

Perhaps the most significant 1981 amendment adopted by the Indiana Supreme Court is the Original Action Rule (Rule).[62] This Rule provides for writs of mandamus and prohibition, and it is a

---

[54]409 N.E.2d 661 (Ind. Ct. App. 1980).

[55]*Id.* at 671-72.

[56]Trial Rule 76 provides for an automatic change of venue upon motion without specifying the ground therefor, and a party shall be entitled to one change from the county and one change from the judge, according to the provisions established in the trial rule.

[57]405 N.E.2d 576 (Ind. Ct. App. 1980).

[58]*Id.* at 578-79.

[59]*Id.* at 580.

[60]*Id.* at 579-80.

[61]*Id.* at 580.

[62]IND. R. P. ORIG. A. 1 to 6 (writs of mandamus and prohibition amended January 1, 1981).

substantial textual change from the former Rule. However, the Rule describes current practice, and the pattern established in the text of the Rule reflects actual practice before the supreme court in pursuing a writ of mandamus or prohibition. The Rule contains six separate rules which describe the mechanism for obtaining the writ of mandamus or prohibition, and it contains four forms adopted by the supreme court to facilitate obtaining either writ.

It is clear from a reading of Rule 1[63] that the Rule governs only original actions for writs of mandamus and prohibition against inferior state courts and a judge or the judges of those courts.[64] Rule 1 expressly states that these Rules do not govern other types of original actions such as: complaints which might be filed against an attorney for some form of misconduct,[65] a writ which might be filed against an administrative agency,[66] or a writ in aid of appellate court jurisdiction.[67] Additionally, the Rule provides that petitions for writs in aid of *appellate court jurisdiction* are not original actions and are governed by Appellate Rule 4(A)(6). The authority for the court of appeals to issue a writ in aid of its appellate jurisdiction is established in Appellate Rule 4(C).[68]

Rule 2(A)[69] contains a condition precedent to making an application for a writ. The application for a writ shall be submitted to the supreme court administrator pursuant to Rule 2(B).[70] Before that submission can be made, however, the relator must have raised the absence of jurisdiction of the respondent court or the failure of the respondent court to act when it is under a duty to act by a written motion filed with the respondent court. An exception to that requirement is an original action involving a change of venue from the judge or county. If this condition precedent is met, then under Rule 2(B) the administrator shall examine the application to determine whether it is complete and in proper form. If it is not, the administrator shall reject the application, return it to the relator, and

---

[63]IND. R. P. ORIG. A. 1. Rule 1 is entitled "Scope of Rules". Under subdivision (D), the rule specifically states that writs of mandamus and prohibition against the administrative agencies and the members thereof are not original actions which are governed by these rules, and under subdivision (E) the rule provides that petitions for writs in aid of appellate court jurisdiction are not original actions governed by these rules.

[64]*Id.* 1(B).

[65]*Id.* 1(C).

[66]*Id.* 1(D).

[67]*Id.* 1(E).

[68]*Id.*

[69]*Id.* 2(A).

[70]*Id.* 2(B).

inform the relator of the reason for rejecting the application. If the application is in proper form, the administrator shall accept it, noting appropriately the date of submission, and shall set the date and time when the supreme court will hear an oral argument on the application.

Rule 3[71] determines the content of the petition for writs of mandamus or prohibition. The rule specifies that the petition shall be verified and affirmed and shall state those facts which are detailed in Rule 3(A).[72] Rule 3 also requires a brief to be filed,[73] a record of proceedings to be made,[74] and a certain form of the writ to be used.[75]

Rule 4[76] explains the hearing procedure and dictates that thirty minutes will be allowed for oral argument.[77] Filing of the application occurs only after the hearing on the application and only if permitted by Rule 5.[78] Thus, considerable activity such as the submission of an application for a writ and an actual hearing on the application before the supreme court occurs before there is any formal filing in the office of the Clerk of the Supreme Court.

Rule 6[79] addresses the submission, filing, and service of the application papers, while Rule 5[80] speaks to the disposition of those applications which are filed for either writ. If the application for the writ is denied[81] and if the relator requests that the application be filed with the Clerk of the Supreme Court, then the administrator *shall deliver* the filing fee to the clerk and file with the clerk all papers submitted previously to him by the parties. Thereafter the relator shall have a twenty-day period in which to file an additional brief with the clerk in support of the relator's application. Rule 5(C) states that after the twenty-day period expires the supreme court shall dispose of the original action by written opinion without a hearing or the filing of any further papers.[82]

---

[71]*Id.* 3.
[72]*Id.* 3(A).
[73]*Id.* 3(B).
[74]*Id.* 3(C).
[75]*Id.* 3(D).
[76]*Id.* 4.
[77]*Id.* 4(C).
[78]*Id.* 5.
[79]*Id.* 6.
[80]*Id.* 5(B), (C).
[81]If the application for the writ is *granted*, IND. R. P. ORIG. A. 5(A) provides that the writ will be issued and the administrator then shall deliver the filing fee to the clerk and file with the Clerk of the Supreme Court all application papers which were submitted to him by the parties. Those papers shall be given a cause number by the clerk and the parties thereafter shall file all subsequent papers with the clerk. *Id.* 5(A).
[82]*Id.* 5(C).

D. Pleadings and Pre-Trial Motions

1. Trial Rule 7(A)(5).—The court of appeals decided that without an order from a trial court, a reply is not justified to special defenses which are listed in Trial Rule 9. In *Adams v. Luros*,[83] a medical malpractice action was brought against a doctor who argued that the plaintiff had not raised the theory of fraudulent concealment arising from certain conduct performed by the defendant in the plaintiff's complaint or in a reply and that, accordingly, the plaintiff was prohibitied from doing so as a factual matter in the case. The court of appeals noted that under Trial Rule 7(A)(5) matters which formerly were required to be pleaded by a reply or some other subsequent pleading may now be proved even though they are not pleaded.[84]

2. Motions and Amendments to Pleadings.—In *Mills v. American Playground Device Co.*,[85] the court noted that when a motion for failure to state a claim pursuant to Trial Rule 12(B)(6) is raised subsequent to the filing of a defendant's answer, the motion is properly addressed by the trial court as a motion under Trial Rule 12(C) for judgment on the pleadings.[86] The court of appeals observed that the standard of review in either case is the same.[87] The court also stated that a 12(C) motion tests the sufficiency of the complaint to ascertain whether it states a redressable claim, or that the motion is used to test the law of the claim, and not the facts which support it.[88]

Trial Rule 15(C) was interpreted in *Eberbach v. McNabney*.[89] In *Eberbach*, a suit was brought because of a collision involving three automobiles. An interpretation of Trial Rule 15(C) developed because the plaintiff sued one Hanson Castor by the wrong name. Castor was deceased when the suit was brought, but his death did not extinguish his legal existence which was, for purposes of this litigation, transferred to a special administrator of Castor's estate. In the appellate court, the special administrator, who was not named as a party by the plaintiff, argued that the suit brought against the decedent was a nullity and therefore no amendment to the complaint, which would relate to the time when the complaint was originally filed, naming the special administrator could be made. Thus, if the

---

[83]406 N.E.2d 1199 (Ind. Ct. App. 1980).

[84]*Id.* at 1201-02.

[85]405 N.E.2d 621 (Ind. Ct. App. 1980).

[86]*Id.* at 626 n.2.

[87]405 N.E.2d at 626 n.2 (citing Anderson v. Anderson, 399 N.E.2d 391, 406 (Ind. Ct. App. 1979)).

[88]*Id.*

[89]413 N.E.2d 958 (Ind. Ct. App. 1980).

argument were correct, the statute of limitations would have run on the plaintiff's action.

The court of appeals held that pursuant to Trial Rule 15(C) the argument was not acceptable. A claim of defense which was asserted in an amended pleading and which arose from the conduct or transaction set forth in the original pleading relates back to the date of the original pleading when the amendment changed the party against whom a claim was asserted providing that the new party has received such notice of the institution of the action that he would not be prejudiced in maintaining his defense and that the new party knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against him.[90]

A leading analysis of Trial Rule 15(C) is found in *General Motors Corp. v. Arnett*,[91] a suit against GM for wrongful death. The action was filed by the deceased's wife who was not appointed the personal representative of the deceased's estate for the purpose of the wrongful death action until after the two-year statutory period had run.

The court of appeals sustained a summary judgment motion against the plaintiff and held that the right to bring a wrongful death action is purely statutory and that bringing the action is a condition of suit itself, not merely a statute of limitation.[92] Thus, the court held that Trial Rule 15(C) was inapplicable because it was not the plaintiff's complaint which was amended; it was the plaintiff's legal status which was changed, and Trial Rule 15(C) does not permit the trial court to change the two-year period from a condition precedent to a statute of limitation.[93] The court said that there was no question about prejudice to GM. Nevertheless, the action was not commenced by a personal representative within the statutory period as a condition precedent to bringing the action. Thus, there was no complaint on file which could be amended.

Trial Rule 15(B) was construed in *Midway Ford Truck Center, Inc. v. Gilmore*.[94] The *Gilmore* court considered whether an issue, once stipulated to have been dismissed with prejudice, may be adjudicated at a later time upon the granting of a motion to amend the pleadings to conform to the evidence. The court reasoned that when an issue has been dismissed with prejudice as a result of the stipulation, the liberal provisions found in Trial Rule 15(B) on conforming a

---

[90] *Id.* at 962.
[91] 418 N.E.2d 546 (Ind. Ct. App. 1981).
[92] *Id.* at 548.
[93] *Id.* at 548-49.
[94] 415 N.E.2d 134 (Ind. Ct. App. 1981).

pleading to the evidence are not applicable.[95] They are subordinated to Trial Rules 41(F) and 60(B).

Trial Rule 41(F) provides that a dismissal with prejudice may be set aside by the trial court "for the grounds and in accordance with the provisions of Rule 60(B)."[96] The majority opinion reasoned that those two provisions control amendments to conform the evidence rather than Trial Rule 15(B).[97]

A dissenting opinion stated that Trial Rules 41(F) and 60(B) do not prevent a trial court from reinstating dismissed legal theories under Trial Rule 15(B) and that Trial Rules 41(F) and 60(B) simply mean that a trial court has the power to act under those rules in addition to Trial Rule 15(B).[98]

3. Res Judicata, Prior Judgments, and Comity.[99]—This reporting period saw several cases discuss the doctrine of res judicata. In *Rees v. Heyser*,[100] the court discussed this doctrine and alluded to *State, Indiana State Highway Commission v. Speidel*,[101] which is probably the leading recent decision in Indiana on res judicata.[102]

The court in *Rees* characterized the two branches of this doctrine as "claim preclusion," which is applicable where "there is a final judgment on the merits in a prior case, which acts as a complete bar to a subsequent action on the same claim between the same parties or those in privity with them," and "issue preclusion," which is applicable "when a particular issue is adjudicated and put into issue in a subsequent suit on a different cause of action between the same parties or those in privity with them. In this instance, the former decision on the issue is binding on the parties in this subsequent suit."[103]

---

[95]*Id.* at 137.

[96]IND. R. TR. P. 41(F).

[97]415 N.E.2d at 138.

[98]*Id.* at 138-39 (Young, J., dissenting). Lewis v. Davis, 410 N.E.2d 1363 (Ind. Ct. App. 1980), is consistent with the dissent in *Gilmore*. *See also* Dominguez v. Gallmeyer, 402 N.E.2d 1295 (Ind. Ct. App. 1980), *discussed in* Harvey, *Civil Procedure and Jurisdiction, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 129, 154 (1981) [hereinafter cited as Harvey, *1980 Survey*].

[99]For a recent case dealing with comity, see Scherer v. Scherer, 405 N.E.2d 40 (Ind. Ct. App. 1980), *discussed in* Rhine & Weinheimer, *Domestic Relations, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 203, 218 (1982).

[100]404 N.E.2d 1183 (Ind. Ct. App. 1980).

[101]392 N.E.2d 1172 (Ind. Ct. App. 1979).

[102]Additional cases discussing res judicata are Indiana Univ. v. Indiana Bonding & Sur. Co., 416 N.E.2d 1275 (Ind. Ct. App. 1981), Glass v. Continental Assur. Co., 415 N.E.2d 126 (Ind. Ct. App. 1981), Martin v. Indiana Bell Tel. Co., 415 N.E.2d 759 (Ind. Ct. App. 1981), Kirby v. Second Bible Missionary Church, 413 N.E.2d 330 (Ind. Ct. App. 1980), State v. King, 413 N.E.2d 1016 (Ind. Ct. App. 1980), United Farm Bureau Mut. Ins. Co. v. Wampler, 406 N.E.2d 1195 (Ind. Ct. App. 1980), and Peterson v. Culver Educ. Foundation, 402 N.E.2d 448 (Ind. Ct. App. 1980).

[103]404 N.E.2d at 1185.

E. Parties and Discovery

1. Appointment of Guardian Ad Litem.—In *Brewer v. Brewer*,[104] the court of appeals held that Trial Rule 17(C) imbued the trial court with the discretion to determine whether to appoint a guardian ad litem and that, accordingly, the appointment of a guardian ad litem is not mandatory.[105] A substantial question arose whether one of the litigants, who filed the action, should have had a guardian ad litem appointed for her at or prior to the commencement of the trial. The trial court determined, after the evidence was closed in the case, that the plaintiff was incompetent and appointed a guardian to manage her affairs. The court of appeals held that the discretion vested in a trial court under Trial Rule 17(C) depends on whether the trial court perceives that the interests of the infant or the incompetent are adequately represented and protected during trial. If so, no guardian ad litem is required even though the trial court concludes after the evidence is presented that the litigant is incompetent to manage the litigant's affairs.[106]

2. Trial Rule 21(B): Venue and Jurisdiction over the Subject Matter.—Trial Rule 21(B) contains two important provisions each of which was interpreted in two separate cases. Those interpretations, while consistent with Trial Rule 21(B), greatly expand the authority of an Indiana trial court.

In *Elliott v. Roach*,[107] the court of appeals held that Trial Rule 21(B) extends a trial court's jurisdiction to all claims and over all parties which are required or permissively asserted if the trial court had jurisdiction and venue over the original claim which was asserted and if the original claim is within the subject matter jurisdiction of the court.[108] The scope of this interpretation is disclosed in the facts in *Elliott*. An action was brought in a municipal court of Marion County, Indiana. At the time the action was commenced, the court had a jurisdictional limitation of $10,000. A suit demanding the return of about $65.00 was initiated by the plaintiff. Three defendants counterclaimed alleging defamation and demanding about $200,000 each. The court of appeals held that the municipal court could entertain the counterclaim which was filed under Trial Rule 13(C) because of the first sentence in Trial Rule 21(B).[109]

In *Piskorowski v. Shell Oil Co.*,[110] the second paragraph in Trial Rule 21(B) was authoritatively interpreted. In the *Piskorowski* deci-

---

[104]403 N.E.2d 352 (Ind. Ct. App. 1980).
[105]*Id.* at 354.
[106]*Id.* at 354-55.
[107]409 N.E.2d 661 (Ind. Ct. App. 1980).
[108]*Id.* at 667.
[109]*Id.* at 667-68.
[110]403 N.E.2d 838 (Ind. Ct. App. 1980).

sion, two suits were filed by the plaintiff in Lake County Superior Court. In 1976, a third action was filed against Shell which moved for summary judgment and for dismissal because the previous actions were pending in the Porter County Superior Court. The Lake County Superior Court ordered consolidation of the 1976 action with the previous actions pending in the Porter County Superior Court. The transcript and pleadings in the 1976 action were never physically transferred to the Porter County Superior Court.

The court of appeals held, however, that when the Lake County Superior Court *ordered* the 1976 action to be consolidated with the previous actions pending in the Porter County Superior Court, at that time and at that moment the Lake County Superior Court lost jurisdiction over the case.[111] Accordingly, it did not matter that the pleadings and transcript were not sent to the Porter County Superior Court because the latter court acquired jurisdiction over the dispute when the Lake County Superior Court entered its order for transfer pursuant to Trial Rule 21(B).

3. Class Action: Trial Rule 23.—Bowen v. Sonnenburg[112] concerned a class action to secure compensation for services performed while persons were patients in institutions for the mentally handicapped and the mentally retarded in the State of Indiana. The court of appeals' opinion contains an outstanding discussion of the development of a class action under Indiana Trial Rule 23. The opinion points out that under Trial Rule 23(A) there are *four* prerequisites to maintaining *all class actions*. Thereafter, Trial Rule 23(B) identifies three separate but not mutually exclusive types of class actions. Under subsection (B) a class action is appropriate if, and only if, in addition to meeting all the requirements for subsection (A), one or more of the additional conditions which are found to exist in subsection (B) is met. These distinct types of class actions are very important because, as the opinion states, Trial Rules 23(C)(2) and 23(C)(3) create substantial distinctions as to notice requirements and opting-out requirements concerning members of a class. These distinctions depend upon whether the class exists under Trial Rule 23(B)(1), 23(B)(2), or 23(B)(3). The court of appeals observed that it is critically important in maintaining a class action that the subsection under which the class exists is properly identified in the pleadings and documents which control that aspect of the case.[113]

The court held that pursuant to Trial Rule 23(C)(2) for any class action which is maintained under subsection 23(B)(3), that the trial court shall direct to the class members the best notice practicable

---

[111] *Id.* at 842.

[112] 411 N.E.2d 390 (Ind. Ct. App. 1980).

[113] *Id.* at 396-98.

under the circumstances, including individual notice to all members who can be identified through reasonable effort.[114] The court referred to and adopted the decisions found in *Eisen IV, Eisen v. Carlisle & Jacquelin.*[115] The court also held that "[a]lthough there are some federal decisions to the contrary, the general view is that these notice requirements and opting-out rights afforded by TR 23(C)(2) *do not apply* to actions maintained under TR 23(B)(1) or (2)."[116] The court stated that "[t]he plain language of TR 23(C)(2) makes the mandatory notice provision and opting-out rights applicable only to class actions maintained under TR 23(B)(3)."[117]

4. Trial Rule 24: Intervention.—This rule was amended effective January 1, 1981,[118] to state that a trial court's determination upon a motion to intervene shall be deemed interlocutory for all purposes unless the ruling by the trial court is made final pursuant to Trial Rule 54(B). The effect of this amendment was to delete a prohibition against an appeal from an order upon a motion to intervene except on appeal from the final judgment. If a determination of finality is appropriate and is made under Trial Rule 54(B), an appeal shall become available even though the order is not the final judgment in the case.

The Supreme Court Rules Committee Note[119] states that the amendment does not affect the decision in *Indiana Bankers Association v. First Federal S. & L. Association.*[120] *Indiana Bankers* held that an interlocutory appeal was appealable pursuant to Appellate Rule 4(B)(5) after a ruling on a motion to intervene. It is an interlocutory order unless, of course, it is made final by the application of Trial Rule 54(B).

5. Trial Rule 53.4: Continuances by Agreement of Parties.—Before January 1, 1981, Trial Rule 53.4 provided that parties could agree to a continuance of a case. The rule was amended

---

[114]*Id.* at 399.

[115]415 U.S. 156 (1974).

[116]411 N.E.2d at 400 (emphasis added).

[117]*Id.*

[118]IND. R. TR. P. 24 has been amended as follows:

(C) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and set forth or include by reference the claim, defense or matter for which intervention is sought. Intervention after trial or after judgment for purposes of a motion under Rules 50, 59, or 60, or an appeal may be allowed upon motion. The court's determination upon a motion to intervene shall be interlocutory for all purposes unless made final under Trial Rule 54(B).

[119]*See* IND. CODE ANN., IND. R. TR. P. 24, Supreme Court Committee Note (West 1981).

[120]387 N.E.2d 107 (Ind. Ct. App. 1979).

effective January 1, 1981, by the Indiana Supreme Court (there was no recommendation from the Supreme Court Rules Committee) to remove those words which permitted continuances to be made by agreement of parties.[121]

6. Discovery.—Several important decisions concerning the subject of discovery were handed down by the Supreme Court of the United States and Indiana's appellate courts during the year under review.

a. Trial preparation materials: Trial Rule 26(B)(2).—The case of *Upjohn Co. v. United States*[122] is perhaps the most significant discovery decision since *Hickman v. Taylor.*[123] *Upjohn* arose because the company believed that some of its overseas divisions might have made illegal payments to foreign governments or officials which would be in violation of certain rules and regulations of the Internal Revenue Service (IRS) and the Securities and Exchange Commission (SEC).

In order to atempt to ascertain whether these suspected violations had in fact occurred, the general counsel of the company, after consultation with outside counsel and the chairman of the board, conducted an internal investigation. A letter containing a questionnaire was directed to all foreign general and area managers over the chairman's signature. The letter was identified as an investigation to determine the magnitude of these possible payments. The letter instructed the managers to treat the investigation as "highly confidential" and not to discuss it with any person other than Upjohn employees who might be helpful in providing the requested information. Responses, it instructed, were to be sent directly to the general counsel. Additionally, the general counsel and outside counsel also interviewed the recipients of the questionnaires and approximately thirty-three other Upjohn officers and employees as a part of the investigation.

Subsequently, a summons was filed by the IRS which sought disclosure of all files relevant to the investigation conducted by the general counsel of the company. The summons specifically referred to the written questionnaire which was sent to the managers of the company's foreign affiliates, and the summons demanded memoranda or notes of interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries. The company refused to produce the documents described in the summons on the grounds that they were: (1) protected from disclosure by the attorney-client privilege, and (2) con-

---

[121]IND. R. TR. P. 53.4 (amended January 1, 1981).

[122]101 S.Ct. 677 (1981).

[123]329 U.S. 495 (1947).

stituted the work product of attorneys in anticipation of litigation and were not discoverable pursuant to Federal Rule of Civil Procedure 26(b)(3) (and Indiana Trial Rule 26(B)(2)).

The lower federal courts ordered a disclosure of information on the ground that the attorney-client privilege did not apply to communications which were made by officers and agents of a corporation to an attorney if those officers and agents were not responsible for directing the company's actions in response to legal advice.[124] The principal reason offered by the lower federal courts was that the communications were not the "client's". The gist of this theory was that the attorney-client privilege is applicable only between the attorney and the "control group" of a corporation, and that "control group" means a president, director, the chairman of the board of directors, and similarly situated officers and persons.[125]

The Supreme Court of the United States reversed,[126] and its principal holdings were these:

(i) The attorney-client privilege applies to corporations. The attorney-client privilege is fully applicable to a corporation (probably this case is citable for the proposition that it is applicable to an organization or an unincorporated association).[127]

(ii) The "control group" test was disallowed. The court reasoned that the "control group" test was too limited because the attorney-client privilege protects not only the giving of professional advice to those who can act on it, but also the giving of information to an attorney to enable him to analyze and deliver sound and informed advice. The Court said that the first step in the resolution of any legal problem is ascertaining the factual background of the problem and sifting through the facts in order to determine those which are legally relevant. The Court observed that many lower-level corporate employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulty. Those employees who have relevant information must be able to communicate directly and openly to the attorney if such corporate counsel is to adequately advise his client with respect to potential problems. Thus, the Court reasoned that the "control group" test, which was adopted by the lower federal courts, frustrated the very purpose of the attorney-client privilege by discouraging the disclosure of relevant information by employees of the client to attorneys

---

[124]United States v. Upjohn Co., 600 F.2d 1223, 1227 (6th Cir. 1979), *rev'd*, 101 S. Ct. 677 (1981).

[125]*Id.* at 1227.

[126]Upjohn Co. v. United States, 101 S. Ct. 677 (1981).

[127]*Id.* at 682-83 (citing United States v. Louisville & Nashville R.R., 236 U.S. 318, 336 (1915)).

who would attempt to render legal advice to the client corporation.[128]

(iii) Does the attorney-client privilege extend to post-employment interviews? The Supreme Court declined to rule on whether the attorney-client privilege still applied to seven of eighty-six employees who were interviewed by corporate counsel after those employees terminated their employment with Upjohn. The Court observed that the question had not been treated in the lower federal courts and declined to pass upon it in the opinion.[129]

(iv) The privilege protects only disclosure of communications. The Court held that the attorney-client privilege protects only disclosure of communications.[130] It does not protect the disclosure of underlying facts although those facts were communicated to an attorney by a client. The distinction which the Court drew is found in the observation that a client cannot be compelled to answer the question, "What did you say or write to the attorney?" But the client may not refuse to disclose any relevant fact within his knowledge merely because he communicated a statement of that fact in his communication to his attorney.[131]

(v) Work-product protection not defeated by mere showing of necessity and hardship. The Court concluded that communications by Upjohn employees to corporate counsel were protected by the attorney-client privilege. This holding disposed of responses to the questionnaires and any notes reflecting responses to interview questions in the dispute. In this regard, the Court held that the burden imposed on the IRS to obtain the necessary information from other sources did not in any respect overcome the policy served by the attorney-client privilege.[132]

(vi) The work-product doctrine protects communications by former employees. The Court held that the work-product doctrine applied to the seven former employees and to counsel's notes and memoranda about those interviews if it should be determined that the attorney-client privilege was not applicable to them.[133]

(vii) Memoranda of oral statements are protected by the work-product doctrine. The Court distinguished, as a part of an attorney's work product, facts which might be found in an attorney's file from an oral statement made by a witness which is presently in the form

---

[128]101 S. Ct. at 683-84.

[129]*Id.* at 685 n.3.

[130]*Id.* at 685.

[131]*Id.* at 685-86 (citing City of Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

[132]101 S. Ct. at 686-89.

[133]*Id.* at 686 n.6.

of an attorney's mental impressions or memoranda. The Court observed that as to the latter type of information, Federal Rule of Civil Procedure 26(b)(3) provides that the trial court "shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."[134] The Court observed that it was clear that oral statements given by witnesses to an attorney fell inside that proscription because of the great danger that their disclosure would also reveal the attorney's mental process.[135] The Court declined to rule whether the language in Rule 26(b)(3) means that no showing of necessity can ever be made which would justify their production, although there is language in the *Hickman* decision which indicates precisely that conclusion.[136]

The work product here consisted of notes and memoranda which were based on oral statements taken by an attorney from a witness. Because those witnesses were also employees of the company, the Court held that their communications were protected by the attorney-client privilege. To the extent that those notes do not reveal privileged communications, they might reveal the attorney's mental process in evaluating the communications.[137] The Court held that as to those communications it was clear that both Rule 26(b)(3) and the *Hickman* decision posit that work product cannot be disclosed simply on a showing of "substantial need and inability to obtain the equivalent without undue hardship."[138] The limited reservation which the Court made was found in the statement that it was not prepared to say that such material is always protected by the work-product rule but that a much more powerful showing of necessity and unavailability by other means must be made in order to compel disclosure.[139] Perhaps the Court was thinking about a situation in which it is impossible to obtain that kind of information from any other sources. For example, a witness is now deceased or some other truly extraordinary factual situation.

The *Upjohn* decision is fully applicable to Indiana and its Trial Rule 26(B)(2) in view of the decisions which have assimilated federal authority and federal interpretations into the Indiana Discovery Rules.[140]

---

[134]*Id.* at 687; FED. R. CIV. P. 26(b)(3).

[135]101 S. Ct. at 688.

[136]Hickman v. Taylor, 329 U.S. 495 (1947). The Court in *Hickman* did "not believe that any showing of necessity can be made under the circumstances of this case so as to justify production." *Id.* at 512.

[137]101 S. Ct. at 686.

[138]*Id.* at 688.

[139]*Id.* at 688-89.

[140]*See, e.g.*, Newton v. Yates, 353 N.E.2d 485 (Ind. Ct. App. 1976).

The court of appeals decision in *In re Snyder*,[141] contains an important interpretation of "in anticipation of litigation" in the trial preparation materials provision of Trial Rule 26(B)(2). An appeal was taken by a mother from a decision which terminated her parental rights to her children. In the trial court, the mother sought discovery of a welfare caseworker's qua investigator's notes which were compiled when the mother was interviewed by that person. The Department resisted the discovery claiming that the notes were "work product" and thus exempt from discovery except on a sufficient showing of good cause.

The appellate court disagreed with the Department's position and overruled the trial court on the point[142] by holding that the "work product" or the trial preparation materials restriction on discovery was not applicable unless the caseworker's notes were prepared in anticipation of litigation and that the test was:

> [W]hether, in the light of the nature of the document and the factual situation of the particular case, the document could be fairly said to have been prepared or obtained because of the prospect of litigation. Conversely, even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.[143]

b. Trial Rule 26(B)(3): expert witnesses.—Trial Rules 26(B)(3)(a) and 26(B)(3)(c) were discussed and interpreted in *Evans v. Huss*.[144] This decision involved an advisory expert who would testify but whose information for which he was compensated concerned computations and drawings of a non-testimonial nature in the hands of the party from whom discovery was sought. A party sought and obtained certain information from the opposing party's expert which was, in essence, advice and work which the expert had given to and performed for the opposing party. Discovery was conducted on an amicable basis, and the opposing party sent to the discovering party a bill for time and travel in responding to the deposition, *and* a bill for certain computations and drawings which were provided to the discovering party. The discovering party, however, refused to pay and argued that it was not liable to pay for the computations and the drawings and that Trial Rule 26(B)(3)(c) was not available to the trial court to order payment unless there was first an order providing for that discovery pursuant to Trial Rule 26(B)(3)(a).

---

[141]418 N.E.2d 1171 (Ind. Ct. App. 1981).

[142]*Id.* at 1177-78.

[143]*Id.* at 1177 (quoting Galambus v. Consolidated Freightways Corp., 64 F.R.D. 468, 472 (N.D. Ind. 1974)).

[144]415 N.E.2d 783 (Ind. Ct. App. 1981).

The court of appeals disagreed. It held that when discovery occurs amicably or pursuant to informal procedures which were agreed to by the parties without the benefit of a trial court order under Trial Rule 26(B)(3)(a) and when a fair and equitable payment is not made, a party may seek a court order under Trial Rule 26(B)(3)(c), and a trial court may grant the order depending upon the merits of the claim for payment or compensation.[145]

c. Trial Rule 30(E): submission of a deposition to a witness.—Trial Rule 30(E) was extensively amended effective January 1, 1981. The new rule speaks to those situations which occurred under the former trial rule when a witness received a deposition and failed to return it to the reporter or officer taking the deposition or when the deposition was returned unsigned to that person. Under the new rule, if a witness desires to change an answer in the deposition submitted to him, then each change shall be noted and made by the witness on a separate form provided by the reporter, and a copy of the change shall be furnished by the reporter to each party.[146] If reading and signing the deposition have not been waived by the witness and each party to the deposition, then the deposition shall be signed by the witness and returned to the reporter within thirty days after being submitted to the witness.[147] If the deposition is not returned to the reporter or has not been signed by the witness, then the reporter shall execute a certificate to that fact, attach it to the original deposition, and cause both to be filed with the trial court. In that event the deposition may be used by any other party as if it had been signed by the witness.[148]

The new rule contains a definition of the words "submitted to the witness." It means notification to the witness and each attorney attending the depositon by registered or certified mail that the deposition can be read in the office of the reporter or officer before whom it was taken, or it means that the original copy of the deposition shall be mailed by registered or certified mail to the witness at an address designated by that witness or his attorney.[149]

It is suggested that Trial Rule 30(E)(1)(b), which provides for mailing the original deposition to the witness at an address designated by the witness or his attorney if requested, must be read in conjunction with Trial Rule 30(F)(2). The latter provision states that "[u]pon payment of reasonable charges therefore, the officer shall

---

[145] *Id.* at 786-88.
[146] IND. R. TR. P. 30(E)(2).
[147] *Id.* 30(E)(3).
[148] *Id.* 30(E)(4).
[149] *Id.* 30(E)(1).

furnish a copy of the deposition to any party or the deponent." It is plain that the Indiana Supreme Court Rules Committee did not intend to create the situation in which the original copy of the deposition would be mailed by an officer or reporter without payment for it which an isolated reading of Trial Rule 30(E)(1)(b) might suggest.

d. Use of depositions: Trial Rule 32.—In *Manning v. Allgood*,[150] the court of appeals held that Trial Rule 32(A)(4) requires only that the relevant portions of a deposition be introduced after other portions of the deposition have been used during an examination at trial.[151] Plaintiff's counsel presented portions of two depositions during the plaintiff's case-in-chief which were read into evidence when the plaintiff's counsel attempted to place the deponent's statements in a chronological order so the jury might better understand the sequence of events. Defense counsel was permitted to read the entire deposition during the presentation of defendant's case-in-chief. The court of appeals held that the trial court correctly refused the defendant's request to read the entire deposition during the presentation of the plaintiff's case and that a reading would have been "unnecessarily disruptive of the plaintiff's case."[152]

e. Trial Rule 33: Interrogatories.—Trial Rule 33 received a significant interpretation in this reporting period. In *Bowling v. Holdeman*,[153] the court of appeals held that answers to interrogatories given under oath pursuant to Trial Rule 33(B) do not automatically become evidence in a case.[154] Before answers to interrogatories can be considered by the trier of fact, they must be introduced into evidence. If they are not, then the answers are not before the trier of fact even though they are on file in a clerk's office or retained by the court pursuant to local procedures.

f. Request for admissions: Trial Rule 36.—Trial Rule 36 received two important interpretations, and the first is found in the case of *Brown v. Union Oil Co.*[155] There the plaintiff alleged an agency relationship which would have imputed liability to Union Oil. However that may be, the court held that the absence of the agency

---

[150]412 N.E.2d 811 (Ind. Ct. App. 1980).

[151]*Id.* at 814.

[152]*Id.*

[153]413 N.E.2d 1010 (Ind. Ct. App. 1980).

[154]*Id.* at 1013.

[155]406 N.E.2d 1218 (Ind. Ct. App. 1980). The scope of discovery under Indiana Trial Rule 36(A) is very broad and is more expansive than FED. R. CIV. P. 36(a). Under the Federal Rule, a request for an admission is limited to "statements or opinions of fact or of the application of law to fact . . . ." This restriction does not appear in the Indiana rule. The facts in *Brown* show the considerable sweep in Indiana's rule. One may request an admission "of the truth of any matters within the scope of Rule 26(B) . . . ." A case which contains a good discussion of relevancy under FED. R. CIV. P. 26(b)(1) is McClain v. Mack Trucks, Inc., 85 F.R.D. 53 (E.D. Pa. 1979).

relationship was established by the plaintiff's failure to respond to a request for an admission under Trial Rule 36.[156] When the plaintiff failed to respond to that request, the trial court granted a summary judgment to the defendant; thus the failure to respond was fatal to the plaintiff's case. Under Trial Rule 36, unlike Trial Rule 33, if an admission is effected because of the failure to respond to a request, then that admission is deemed established for all purposes in the litigation, and it may not be contradicted by the finder of fact unless the admission is amended away under Trial Rule 36(B).

The latter provision was interpreted in the case of *Hanchar Industrial Waste Management, Inc. v. Wayne Reclamation & Recycling, Inc.*[157] In *Hanchar*, the trial court permitted a defendant to file answers to the plaintiff's request for admissions after the time specified in the request had expired. After the defendant's failure to respond to the request for the admission, the defendant filed a motion for an extension of time in which to answer the request on the grounds of excusable neglect pursuant to Trial Rule 6(B)(2),[158] which motion the trial court granted. The court of appeals held that the granting of an extension of time was error and concluded that Trial Rule 36(B) specifically establishes the standard to be utilized by a trial court in determining whether a party should be allowed to withdraw or amend its admissions.[159] Because that standard makes no reference to Trial Rule 6(B)(2) or to excusable neglect, the court held that "excusable neglect" had no bearing on whether the defendant in this case should have been permitted to withdraw or amend the admissions made by operation of law by failing to respond to the request.[160]

g. Enforcement of discovery: Trial Rule 37.—Several important holdings developed in this area during the year in review.

(i) Enforcement without preceding trial court order. In *State v. Kuespert*,[161] the State of Indiana failed to make adequate responses to requests for discovery consisting of certain interrogatories, requests for admissions, and other discovery information. The

---

[156]406 N.E.2d at 1219-20.

[157]418 N.E.2d 268 (Ind. Ct. App. 1981).

[158]IND. R. TR. P. 6(B)(2) provides for the enlargement of time after the expiration of a specified period in which an act is to be performed, upon the basis of excusable neglect. The rule also contains absolute restrictions upon a trial court's ability to extend time in which to perform an act under Trial Rules 50(A), 52(B), 59(C), and 60(B). The opinion in Skolnick v. State, 417 N.E.2d 1103 (Ind. 1981), shows that the time for filing a motion to correct error under Trial Rule 59(C) cannot be extended under Trial Rule 6 even if there were a showing of excusable neglect.

[159]418 N.E.2d at 270.

[160]*Id.* (citing Pathman Const. Co. v. Drum-Co Engin., 402 N.E.2d 1 (Ind. Ct. App. 1980) *discussed in* Harvey, *1980 Survey*, *supra* note 98, at 162-63).

[161]411 N.E.2d 435 (Ind. Ct. App. 1980).

responses which were filed appeared to be incomplete and inaccurate particularly in view of a previous hearing in the case. The plaintiff filed a motion to compel production and response to the requested discovery. The motion asked for attorney's fees and expenses on the ground that the state had repeatedly given partial, inaccurate or untrue, and misleading information in response to discovery procedures. The trial court awarded attorney's fees in the amount of $1,400 and ordered compliance with the discovery request.

The court of appeals sustained the trial court's orders and pointed out that under Trial Rule 37 costs and expenses might be assessed "when a party must go to the trouble of obtaining a court's intervention to compel discovery."[162] The court concluded that Indiana Trial Rule 37(B)(2)(c) allows such cost assessments against a party who has failed to comply with the discovery request *when there is no preceding order to make the discovery or to comply with the discovery request* and when it is shown that the party from whom the discovery is sought has been obstructive or derelict in its failure to respond to the discovery requests.[163]

(ii) Remedies for failure to follow court orders compelling discovery. In *Chrysler Corp. v. Reeves*,[164] the court of appeals appeared to qualify its policy concerning dismissal pursuant to Trial Rules 37(B)(2) and (4). In *Chrysler Corp.*, a trial court entered a judgment on the issue of liability against the corporation which, if affirmed, would have left the sole issue as one of damages to be awarded to the plaintiff. The court of appeals held that even though the two critical findings under Trial Rules 37(B)(2) and (4) had been made, nevertheless the trial court had "abused its discretion in ordering a partial default because *other relief would have been adequate*."[165] The court concluded that, as a matter of policy, other available remedies should be used rather than dismissing an action or finding against one of the parties. The court of appeals suggested that the assessment of attorney's fees might stimulate an answer to an interrogatory and preserve the possibility of trial on the merits at the same time.[166]

The extensive power to visit sanctions upon an attorney was reviewed and specifically affirmed by the United States Supreme Court in *Roadway Express, Inc. v. Piper*.[167] In *Roadway*, three attorneys brought suit against Roadway on behalf of two of its employees claiming certain employment discrimination. The at-

[162] *Id.* at 437.
[163] *Id.*
[164] 404 N.E.2d 1147 (Ind. Ct. App. 1980).
[165] *Id.* at 1152 (emphasis added).
[166] *Id.* at 1154.
[167] 100 S. Ct. 2455 (1980).

torneys manifestly lacked diligence because they failed to respond to interrogatories, to appear for argument, to attend a rescheduled argument, to meet appointed deadlines, to appear on appointed days, and to comply with federal district court requests for the filing of briefs and other matters. Roadway moved to dismiss the suit under Federal Rule of Civil Procedure 37(b)(2)(C) and requested an award of attorney's fees and costs in excess of $17,000.

The Court interpreted Federal Rule of Civil Procedure 37(b) and the sanctions contained therein to authorize a trial court to impose expenses, including attorney's fees, upon parties and counsel.[168] The Court held, "Rule 37 sanctions must be applied diligently both 'to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent.' "[169]

The Court affirmed a federal district court's authority to dismiss the case because of the failure of the *attorneys* to act diligently and expressly held that the attorneys may be charged with the resulting costs and attorney's fees which Roadway had demanded.[170] Alternatively, the Supreme Court held that a federal trial court has the inherent power, apart from Federal Rule of Civil Procedure 37, to levy sanctions upon attorneys for abusive litigation practices.[171] Additionally, the Court affirmed that a trial court has the inherent power to dismiss *sua sponte* for the lack of prosecution, separate and distinct from Federal Rule of Civil Procedure 41(b).[172] The Court finally held the general rule in federal courts that a litigant will not recover his counsel fees does not apply when the opposing party or counsel has acted in bad faith.[173]

F. Trial and Judgments

1. Entry of Final Judgment: Trial Rule 54(B).—In *Krueger v. Bailey*,[174] the plaintiff brought an action arising from a frisbee accident which occurred on a school playground. Suit was filed against four defendants, three individuals and the Michigan City Area Schools Corporation. Each defendant filed a motion for summary judgment. Two of those motions were granted and two were not.

---

[168]*Id.* at 2462-63.

[169]*Id.* at 2463 (citing National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643 (1976)).

[170]100 S. Ct. at 2463.

[171]*Id.* at 2463.

[172]*Id.* at 2463-64.

[173]*Id.* at 2464. The *Roadway* decision also interpreted 28 U.S.C. § 1927, which relates specifically to federal trial courts, and is beyond the scope of Indiana state court practice and development. The reader should examine *Roadway*, however, for the interpretation given to § 1927 under Title 28 of the United States Code.

[174]406 N.E.2d 665 (Ind. Ct. App. 1980).

On appeal a question was raised whether a trial court's failure to resolve all of the issues as to all the parties resulted in a "final judgment" from which the appeal might be taken. The court of appeals held that when summary judgment disposes of less than all of the claims or parties, then the judgment is interlocutory and is not final.[175] It is not appealable unless a trial court expressly determines in writing that there was no just reason for delay and expressly directs in writing the entry of a judgment thereon.[176]

However that may be, the court of appeals, in an unusual act, considered the case on the merits and proceeded to dispose of the appeal. The appellate court acted in its discretion as it is authorized to do by Appellate Rule 4(E).

2. Default Judgments: Trial Rule 55.—There is a critical distinction betweeen being entitled to three days notification pursuant to Trial Rule 55(B) and being permitted to file a pleading or document which will avoid that party's default during those three days.

This distinction was illustrated in the case of *Erdman v. White*.[177] The opinion is very important and reveals a split among the districts in the court of appeals. In *Erdman*, the plaintiff obtained a default judgment against the defendant because the defendant failed to comply with a court order issued after a hearing held on March 2, 1979. The trial court order directed the defendant to answer within ten days, which the defendant failed to do. On March 13, 1979, the plaintiff moved for and received a default judgment against the defendant; on that day, the defendant did file an answer by his out-of-state attorney. The gist of the defendant's argument on appeal was that because the defendant had appeared, he was entitled to an additional three-day notice under Trial Rule 55(B) and could hence file the answer when the additional time commenced to run, which, according to the defendant, began on March 13, 1979.

The appellate court squarely held to the contrary. The court held that it was within the trial court's discretion to grant the default judgment or to allow the defendant to file an answer to the complaint.[178] In short, the three-day notice in Trial Rule 55 does not provide a delinquent party additional time in which to plead and thereby entirely avoid the question of default. This opinion cited *Hiatt v. Yergin*[179] and expressly disapproved of it to the extent that

---

[175]*Id.* at 667.

[176]*Id.* (citing IND. R. TR. P. 56(C); Stanray Corp. v. Horizon Constr., Inc., 342 N.E.2d 645 (Ind. Ct. App. 1976); and Kasten v. Sims Motor Transp., 166 Ind. App. 117, 333 N.E.2d 906 (Ind. Ct. App. 1975)).

[177]411 N.E.2d 653 (Ind. Ct. App. 1980).

[178]*Id.* at 657 (citing Green v. Karol, 168 Ind. App. 467, 473, 344 N.E.2d 106, 110 (1976)).

[179]152 Ind. App. 497, 284 N.E.2d 834 (Ind. Ct. App. 1972).

it interpreted Trial Rule 55(B).[180] The opinion also cited the cases of *Clark County State Bank v. Bennett*[181] and *Snyder v. Tell City Clinic*[182] as cases which approved the interpretation given to Trial Rule 55 by the *Erdman* court.

3. Entry of Final Judgment: Trial Rule 58.—In *In re Estate of Jackson,*[183] the court of appeals held that the entry of a judgment pursuant to Trial Rule 58 is made when the judgment is entered as required by Trial Rule 77(E) but that the judgment or order itself need not be set out and may make reference to a separate order book in which the ruling is entered verbatim.[184]

The occasion for this holding was an appeal by the Department of Revenue in which the appellate court held that the Department's motion to correct error was not timely filed because it was one day too late.[185] A mere one-sentence entry was made by the probate court on the estate docket book while a written order was entered in its entirety in the probate order book to which reference was made in the docket book. The appellate court held that the docket book entry with reference to where the full judgment could be found was insufficient.[186]

Another case which interpreted Trial Rule 58 was *State v. Normandy Farms.*[187] There the State initiated a condemnation action for about five acres of land. The jury returned a verdict for the defendant, Normandy Farms, but a mistake appeared in the jury verdict where it assessed the sum of "no damage dollars." Apparently, the jury intended that the Farm would receive approximately $96,000 for the land actually taken, but no damages to the residue. The jury was polled, and it was apparent from several statements made by the jury that the mistake had occurred. The trial court, pursuant to a motion to correct error filed by the Farm, ordered a new trial.

The State argued on appeal that Trial Rule 58 required the trial court to enter judgment on the verdict. The court of appeals held that Trial Rule 58 required a prompt entry of a judgment, *but the required judgment is not restricted to a judgment on the verdict.*[188] Therefore, if the jury verdict is clearly erroneous, as here, "T.R. 58 does not mandate the trial court to perpetuate the error by entering judgment on the verdict."[189] The rule requires the trial court to

---

[180]411 N.E.2d at 656-57.
[181]166 Ind. App. 471, 336 N.E.2d 663 (Ind. Ct. App. 1975).
[182]391 N.E.2d 623 (Ind. Ct. App. 1979).
[183]409 N.E.2d 1251 (Ind. Ct. App. 1980).
[184]*Id.* at 1253.
[185]*Id.* at 1254.
[186]*Id.* at 1253-54.
[187]413 N.E.2d 268 (Ind. Ct. App. 1980).
[188]*Id.* at 270.
[189]*Id.* at 270-71.

promptly enter a judgment which may include any form of corrective relief which is available under Trial Rule 59(J) (the opinion refers to Trial Rule 59(I), which was the alphabetizing of the rule when the decision was reached). Thus, Trial Rule 58, the court held, "does not excuse the trial court from entering a final judgment in order to preserve the parties' appellate rights, it only authorizes the refusal to enter a judgment on the verdict."[190]

4. Preliminary Injunctions and Temporary Restraining Orders: Trial Rule 65.—The case of *Bottoms v. B&M Coal Corp.*[191] arose from a violent labor strike in southern Indiana. An injunction was obtained against persons who committed violent destructive acts on the company's property. One of the questions raised on appeal was whether there was sufficient notice of the restraining orders which had been issued by the trial court as a predicate for a contempt of court citation. Appellants argued that because they were not properly served with notice of the restraining orders, they could not be held in contempt of them.

The court of appeals disagreed and held that notice of an injunction or a restraining order must be served on a person who is to be enjoined by the order but that an exception exists to that general principle when it is shown that a person had actual knowledge of a restraining order or injunction. When that showing is made that person "may be held liable for violating the provisions of the order."[192] In this respect, actual knowledge must be established from the facts presented to the trial court, but actual knowledge may be shown by "circumstantial evidence" or may be inferred from the facts of the case.[193] In this case, there was ample support for the trial court's findings that all of the appellants had actual knowledge of the retraining order. The court of appeals also held that the proper procedure in Indiana is that before a defendant may be held in contempt for violating an injunction, the court should bring the offender before the court a second time and then determine the appropriate penalty.[194]

In *Good v. Crowel*,[195] a temporary injunction was issued as a result of a school reorganization dispute in which Good, a newly elected school board member, was restrained from participation in certain school board proceedings. Good agreed to a stipulation in

---

[190] *Id.* at 271.

[191] 405 N.E.2d 82 (Ind. Ct. App. 1980). *See* Archer, *Labor Law, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 269, 287-88 (1981), for a thorough presentation of the factual background in *Bottoms*.

[192] 405 N.E.2d at 89 (citing Shaughnessey v. Jordan, 184 Ind. 499, 111 N.E. 622 (1916)).

[193] 405 N.E.2d at 89.

[194] *Id.* at 94-95.

[195] 416 N.E.2d 899 (Ind. Ct. App. 1981).

which the temporary restraining order was dissolved. In an appeal, Good argued that under Trial Rule 65(C) he should be allowed to collect attorney's fees despite the agreement dissolving the injunction.

The court of appeals held that a "voluntary dismissal *by a plaintiff* of an action in which a bond has been given and a temporary restraining order or an injunction has been obtained is considered to be a breach of the bond."[196] Under Indiana precedent such a dismissal is tantamount to a judicial determination that the plaintiff was not entitled to the equitable relief sought, and therefore the injunction was wrongfully granted.[197] However that may be, a dismissal of an action *by both parties* through an amicable and voluntary agreement is quite different. The court held that the agreement "does not operate as a confession of judgment by the plaintiff nor does it admit that the plaintiff had no right to the injunction."[198] Thus when there is an amicable and voluntary agreement of both parties, the defendant or the enjoined person waives his rights under the bond and any right of action based on a breach of the bond. The court of appeals concluded that the trial court properly dismissed Good's motion for an assessment of damages against the surety.

G. *Appeals*

1. Motion to Correct Error: Trial Rule 59.—This rule was substantially revised effective January 1, 1980.[199] The 1981 amendments restate and realign some of the sections of the rule without change in the meaning of the 1980 amendments. Perhaps the most significant realignment was to place the language of the 1980 version of the rule concerning the "Statement of Opposition to a Motion to Correct Error" in a separate paragraph. The purpose of this change, which appears in the 1981 version as Trial Rule 59(E), is to show that the statement of opposition to a motion to correct error is intended to be applicable to every situation in which a motion to correct error is made. Previously that provision was found in a paragraph which related to the denial of a motion to correct error, and it might have been read as being applicable only in that situation. It is not, however, and the statement of opposition applies to all motions to correct error if the party opposing that motion should choose to file a statement of opposition.

The statement in opposition was authoritatively interpreted in the decision of *Ralston v. State*.[200] In *Ralston*, the defendant filed a

---

[196]*Id.* at 901 (emphasis in original).

[197]*Id.* (citing St. Joseph & Elkhart Power Co. v. Graham, 165 Ind. 16, 74 N.E. 498 (1905)).

[198]416 N.E.2d at 901.

[199]*See* Harvey, *1980 Survey*, *supra* note 98, at 171-89 for an extensive discussion of the 1980 revisions to Trial Rule 59.

[200]412 N.E.2d 239 (Ind. Ct. App. 1980).

motion to correct error to which the State did not respond in the trial court. On appeal the defendant principally argued that a motion to correct error is viewed as a "complaint on appeal" and that accordingly there must be an "answer" to that "complaint."

The court of appeals held that even though there is now an *opportunity* to respond to a motion to correct in the trial court pursuant to Trial Rule 59(E), it *is not mandatory* that the opponent to the motion respond.[201] Additionally, there is no "admission" when there is a failure to respond or file the statement in opposition.[202] The court of appeals also held that the motion to correct error "is clearly not a complaint in the literal sense as the term is used" in Indiana Trial Rule 7.[203]

The opinion in *Stanley v. Kelley*[204] is one of the clearest statements in Indiana's appellate literature on the trial court's function when a motion to correct error has been made after a judgment has been entered upon a jury verdict. In this case a judgment was entered for the plaintiff for approximately $130,000, which was set aside by the trial court as a jury verdict which was "clearly erroneous and not supported by the evidence."

The court of appeals stated that under Trial Rule 59(J)(7) (the opinion refers to Trial Rule 59(I)(j), the lettering used before the 1981 amendments), a trial court reviewing the evidence can respond in one of three ways:

> If the trial court determines the verdict is against the weight of the evidence, it shall grant a new trial, making special findings upon each material issue and relating the supporting and opposing evidence to each issue upon which a new trial is granted. If the trial court determines the verdict is clearly erroneous as contrary to or not supported by the evidence, it shall enter final judgment, specifying the . . . reasons therefor. If, however, the trial court, after finding the verdict clearly erroneous, determines that entry of final judgment would "be impracticable or unfair to any of the parties or is otherwise improper . . . ," it may grant a new trial, making special findings of fact upon each material issue and showing why judgment was not entered upon the evidence.[205]

The court then held that when a trial court is reviewing a motion for judgment on the evidence subsequent to a jury verdict and

---

[201] *Id.* at 245.

[202] *Id.*

[203] *Id.*

[204] 417 N.E.2d 1145 (Ind. Ct. App. 1981), *appellate opinion on the merits*, 422 N.E.2d 663 (Ind. Ct. App. 1981).

[205] 417 N.E.2d at 1146.

the claim is that the verdict was clearly erroneous because not supported by the evidence, "it views only the evidence favorable to the non-moving party and the reasonable inferences to be drawn therefrom."[206] The trial court may not weigh the evidence, and it is clearly erroneous only if there is no substantial evidence or reasonable inference to be adduced therefrom to support an essential element of the claim. This means that the evidence must point unerringly to a conclusion not reached by the jury. The court of appeals also stated that the standard of appellate review of a trial court determination that the verdict is clearly erroneous is "identical to the standard of review guiding trial judges."[207]

The court also held that "[i]n reviewing a claim that the weight of the evidence preponderates against the jury's verdict, the trial judge sits as a 'thirteenth juror.' . . . If . . . the trial judge believes that a contrary result should have been reached in the minds of reasonable men, it should grant a new trial."[208] The case was remanded to the trial court for compliance with Trial Rule 59(I)(7) to show why the judgment was entered for defendant Kelley.

2. Finality of Judgments: Appealable Final Orders.—The opinion in *City of Evansville v. Miller*[209] concerned a class action filed against the City of Evansville in 1969. The action arose because of an amendment to its municipal code which concerned a refusal to collect trash and refuse from certain dwelling houses and apartments. A similar ordinance was held by the Indiana Supreme Court to improperly distinguish between commercial and non-commercial enterprises.[210] After that holding, the Warwick County Circuit Court entered a judgment on September 7, 1973, which in essence determined that the defendants were liable to the plaintiffs in the class action from and after March, 1969, when the action was filed. The City did not perfect an appeal from that entry because the City did not file a praecipe for an appeal.[211]

After the determination of liability was made, evidence was taken for the next four-and-a-half years and presented to a master to determine damages to the class. Damages were established at approximately $240,000 plus eight percent interest from 1973. On appeal the City attempted to raise questions concerning the liability side of the case, but the court of appeals refused to entertain that part of the appeal.

---

[206] *Id.* at 1146-47.

[207] *Id.* at 1147.

[208] *Id.* (citation omitted).

[209] 412 N.E.2d 281 (Ind. Ct. App. 1980).

[210] State *ex rel.* Miller v. McDonald, 260 Ind. 565, 297 N.E.2d 826 (1973), *cert. denied*, 414 U.S. 1158 (1973).

[211] IND. R. APP. P. 2(A) states that an appeal is initiated by filing with the clerk of the trial court a praecipe designating what is to be included in the record of the pro-

The appellate court held that the trial court's order, which determined liability and reserved until a later date a ruling on damages, became a final and appealable order at the time the City's motion to correct error was denied in 1973.[212] The City failed to perfect an appeal from that final and appealable order, and as a result the court of appeals declined to entertain the appeal on those issues. The appellate court also held that the requirements of Trial Rule 54(B) did not preclude this result because the rule deals with multiple claims and multiple parties. The court reasoned that in this class action there was essentially one issue, the liability of the City, and that once that liability was determined, it was appealable notwithstanding the future determination of damages.[213]

3. Damages for Vexatious Appeals: Appellate Rule 15(G).—The cases of *Sandock v. Taylor Construction Corp.*,[214] *Indiana Department of Public Welfare v. Rynard*,[215] and *Deetz v. McGowan*[216] all acknowledge the availability of the power of an appellate court to assess damages for frivolous appeals which is plainly established in Appellate Rule 15(G). In *Rynard*, the appellate court held that an appeal by the Department of Public Welfare was vexatious and frivolous and awarded damages in the amount of ten percent of the trial court's judgment of over $250,000 against the Department.[217]

In *Sandock*, the court of appeals also entered a judgment of ten percent of the judgment that was entered in the trial court.[218] *Sandock* was a case in which the court of appeals concluded that a defendant's refusal to pay upon a contract pursuant to which the plaintiff had fully performed, thus forcing the plaintiff to file an action to collect on the contract and allowing the defendant five years in which to avoid payment of the defendant's debt, was in bad faith.[219] Further, the court reasoned that there was no substance in the defendant's appeal which the court found was taken to harrass and to delay.[220] Upon those facts and with those findings, the court of appeals awarded a ten percent judgment based upon the amount of the trial court's judgment. It affirmed the trial court's judgment but modified it by the amount of the damages made pursuant to the finding and determination in the appellate court.

---

ceedings. The praecipe shall be filed within thirty days after the trial court's ruling on the motion to correct errors or the right to appeal will be forfeited. Kelsey v. Nagy, 410 N.E.2d 1333 (Ind. Ct. App. 1980).

[212] 412 N.E.2d at 284.

[213] *Id.*

[214] 416 N.E.2d 882 (Ind. Ct. App. 1981).

[215] 403 N.E.2d 1110 (Ind. Ct. App. 1980).

[216] 403 N.E.2d 1160 (Ind. Ct. App. 1980).

[217] 403 N.E.2d at 1113.

[218] 416 N.E.2d at 866.

[219] *Id.*

[220] *Id.*

4. Appellate Court Jurisdiction: Appellate Rule 3(A).—A strong general principle in Indiana appellate practice is that the appellate court acquires jurisdiction of a case upon the filing of the record of proceedings and that the jurisdiction is to the exclusion of all further activity in the trial court.[221]

The case of *Donahue v. Watson*[222] is an exception to that general principle. There the trial court found that a defendant had committed a breach of trust and ordered the defendant removed as a trustee. The trial court stated that the defendant was liable to the beneficiaries for their attorney's fees, but no award of fees was included in the order. An appeal was taken. After the record of proceedings was on file in the appellate court, the trial court entered a second judgment, an order directing the defendant to pay $10,000 in attorney's fees incurred by the beneficiaries. On appeal the defendant argued that when the record of proceedings was filed, the trial court lost jurisdiction over the entire subject matter of the controversy pursuant to Appellate Rule 3(A).

The court of appeals held that generally this was correct, but that Appellate Rule 3(A) did not prevent the trial court from entering a judgment concerning attorney's fees because the "trial court impliedly reserved this ancillary matter until an evidentiary hearing could be conducted and a determination made as to what a reasonable fee would be."[223] The appellate court stated that it believed that this practice is contemplated in the language of Trial Rule 54(B) and concluded that the trial court retained a limited jurisdiction over the case to dispose of those claims left unresolved by the first judgment.[224]

5. Additional Appellate Rule Amendments in 1981.—During the past year, the Indiana Supreme Court amended Appellate Rule 8.1 to state that the failure of an appellant to timely file the appellant's brief, which shall be filed thirty days after the record of proceedings is filed, shall subject the appeal to summary dismissal.

Additionally, part (A) of the Appellate Rule 12 was amended as follows (the amendment is self-explanatory): "Papers required or permitted to be filed in a court of appeal shall be filed with the clerk in the manner prescribed in subdivision (C) below or by personally presenting the papers to the clerk or a person designated by the clerk."[225]

---

[221]The principle of exclusive appellate court jurisdiction is a derivation of IND. R. APP. P. 3(A) which states that every appeal should be deemed submitted and the appellate court shall acquire jurisdiction on the date that the record of proceedings is filed with the clerk of the appellate court.

[222]413 N.E.2d 974 (Ind. Ct. App. 1980).

[223]*Id.* at 975-76.

[224]*Id.*

[225]IND. R. APP. P. 12.

APPENDIX

INDIANA JUDICIAL REPORT FOR 1980

TOTAL CASES FILED IN 1980

SUMMARY

	Circuit, Superior, Probate Courts	Marion Municipal Courts	County Courts & County Court Function	Total
Criminal	17,183	50,245	72,916	140,344
Re-Docketed Criminal	2,830	64	2,211	5,105
Juvenile	27,732	-0-	-0-	27,732
Civil (Plenary)	58,988	13,100	7,304	79,392
(Small Claims)	-0-	-0-	111,448	111,448
Re-Docketed Civil	16,880	11,081	48,294	76,255
Dissolution	49,132	-0-	-0-	49,132
Re-Docketed Dissolution	29,837	-0-	-0-	29,837
Probate/Adoption	21,799	-0-	-0-	21,799
Non-Felony Traffic	-0-	91,012	320,971	411,983
Guardianship	5,532	-0-	-0-	5,532
Other	10,793	2	5,950	16,745
TOTAL	240,706	165,504	569,094	975,304

APPENDIX

INDIANA JUDICIAL REPORT FOR 1980

TOTAL CASES FILED IN 1980

SUMMARY

	Circuit, Superior, Probate Courts	Marion Municipal Courts	County Courts & County Court Function	Total
Criminal	16,889	37,443	64,471	118,803
Re-Docketed Criminal	2,717	64	2,177	4,958
Juvenile	26,462	-0-	-0-	26,462
Civil (Plenary)	55,365	13,093	4,182	72,640
(Small Claims)	-0-	-0-	107,342	107,342
Re-Docketed Civil	13,353	8,037	36,260	57,650
Dissolution	48,053	-0-	-0-	48,053
Re-Docketed Dissolution	27,111	-0-	-0-	27,111
Probate/Adoption	21,743	-0-	-0-	21,743
Non-Felony Traffic	-0-	88,419	301,486	389,905
Guardianship	4,185	-0-	-0-	4,185
Other	9,194	5	5,174	14,373
* TOTAL	225,072	147,061	521,092	893,225

* This includes Venued Out cases.

APPENDIX

INDIANA JUDICIAL REPORT FOR 1980

1980 METHOD OF DISPOSITION
SUMMARY

	Circuit, Superior, Probate Court	Marion Municipal Courts	County Courts & County Court Function	Total
Jury Trial				
Criminal	1,039	86	167	1,292
Civil (Plenary)	646	36	22	704
(Small Claims)	-0-	-0-	-0-	-0-
Other	49	24	70	143
Bench Trials				
Criminal	1,388	7,080	7,837	16,305
Civil (Plenary)	11,235	1,093	787	13,115
(Small Claims)	-0-	-0-	20,818	20,818
Re-Docketed Civil	4,883	5,335	18,630	28,848
Dissolution	32,393	-0-	-0-	32,393
Non-Felony Traffic	-0-	2,068	10,126	12,194
Other	57,198	50	4,603	61,851
Settled	12,609	661	22,280	35,550
Plea	15,743	64,305	128,777	208,825
Dismissed	52,069	49,424	70,448	171,941
Default	20,505	8,570	46,649	75,724

Traffic Violations Bureau	-0-	6,985	172,164	179,149
Transferred Out	1,330	-0-	2,971	4,301
Venued Out	5,644	76	406	6,126
Closed	7,498	-0-	-0-	7,498
Other	843	1,268	5,524	7,635
Failed to Appear	-0-	-0-	8,813	8,813
TOTAL	225,072	147,061	521,092	893,225

IV. Commercial Law

GERALD L. BEPKO*

A. *Dishonored Checks*

During the past several years there has been a movement in Indiana to permit non-lawyers to practice law as employees of corporations in small claims courts.[1] This movement is based, at least in part, on the assumption that retail merchants must frequently sue on dishonored checks. Arguably, corporate retail merchants should be entitled to file and prosecute these routine cases through non-lawyer employees without incurring the extra expense of hiring a lawyer. This argument, however, not only makes the dubious assumption that less expense would be incurred by prosecuting such cases through non-lawyer employees, but it also ignores the existence of two different statutes designed to shift the cost of litigation on dishonored checks to the defaulting drawer.[2] Both of these statutes have been the subject of developments this year which have increased their potential efficacy for plaintiffs suing on dishonored checks.

The first statute is Indiana Code section 34-4-30-1 which provides that:

> If a person suffers a pecuniary loss as a result of a violation of IC 35-43, he may bring a civil action against the person who caused the loss for (1) an amount equal to three (3) times his actual damages; (2) cost of the action; and (3) a reasonable attorney's fee.[3]

Indiana Code article 43 of title 35 contains the portion of the Indiana Criminal Code dealing with offenses against property,[4] and Indiana

---

*Acting Dean and Professor of Law, Indiana University School of Law—Indianapolis. B.S., Northern Illinois University, 1962; J.D., IIT/Chicago-Kent College of Law, 1965; L.L.M., Yale University, 1972.

[1]The Indiana Legislature enacted a statute permitting corporations to practice law in small claims court but that statute was held in violation of the Indiana Constitution in State *ex rel.* Western Parks, Inc. v. Bartholomew County Court, 383 N.E.2d 290 (Ind. 1978). The Supreme Court Rules Committee recommended a Supreme Court Practice Rule to permit some limited practice by corporate employees in closely-held corporations but the supreme court did not adopt such a rule. In 1981, H.R.J. Res. 1 was introduced in the Indiana Legislature. This joint resolution was a preliminary effort to amend the Indiana Constitution to permit corporations to practice law and to overcome the decision in the *Bartholomew* case. H.R.J. Res. 1 did not pass the 1981 Indiana Legislature.

[2]IND. CODE §§ 34-4-30-1 (Supp. 1981), 28-2-8-1 (1976 & Supp. 1981).

[3]*Id.* § 34-4-30-1.

[4]*Id.* §§ 35-43-1-1 to -5-5.

Code section 35-43-5-5 deals specifically with check deception. Section 35-43-5-5 provides that "[a] person who knowingly or intentionally issues or delivers a check . . . for the payment of . . . money . . . knowing that it will not be . . . honored upon presentment . . . commits check deception, a Class A misdemeanor."[5] Presumptions are available to aid in proving check deception. Issuance of a check which is later dishonored constitutes prima facie evidence that the person issuing the check knew that it would not be honored. Similarly, evidence that a person had insufficient funds in his account or had no account constitutes prima facie evidence that the person knew that the check would not be honored.[6] Aided by these presumptions, a holder of a dishonored check can combine Indiana Code sections 35-43-5-5 and 34-4-30-1 to sue the drawer for treble damages, costs, and attorney's fees.

This past year, the Indiana Court of Appeals decided two cases which involved suits under these provisions of the Indiana Code. These cases clarified the rights of the holder of a dishonored check. First, in *American Leasing, Inc. v. Maple*,[7] the court of appeals made it clear that it is unnecessary to establish that there has been a conviction under Indiana Code article 43 of title 35 to recover treble damages, costs, and attorney's fees under Indiana Code section 34-4-30-1.[8] Second, before a person can recover under Indiana Code section 34-4-30-1, he must show a pecuniary loss.[9] The court of appeals held that when a check is dishonored, the payee is denied the money represented by the check and thus suffers a pecuniary loss for purposes of Indiana Code section 34-4-30-1.[10] Third, in *McMahon Food Co. v. Call*,[11] the court of appeals laid to rest the argument that Indiana Code section 34-4-30-1 is unconstitutional because it exposes the defendant to double jeopardy.[12] This argument is based on a very old case, *Taber v. Hutson*,[13] which has created much mischief in the Indiana courts. In *Taber*, the court stated that:

> The constitution declares, that "no person shall be twice put in jeopardy for the same offence;" and though that provision may not relate to the remedies secured by civil proceedings,

---

[5]*Id.* § 35-43-5-5(a).

[6]*Id.* § 35-43-5-5(c).

[7]406 N.E.2d 333 (Ind. Ct. App. 1980).

[8]*Id.* at 335.

[9]*Id.*

[10]*Id.*

[11]406 N.E.2d 1206 (Ind. Ct. App. 1980).

[12]*Id.* at 1208 (citing State ex rel. Beedle v. Schoonover, 135 Ind. 526, 35 N.E. 119 (1893)).

[13]5 Ind. 332 (1854).

> still it serves to illustrate a fundamental principle inculcated by every well-regulated system of government, viz., that each violation of the law should be certainly followed by one appropriate punishment and no more.[14]

Thus, the argument follows that a person should not be exposed to the imposition of a punitive damages award and criminal prosecution for the same conduct. Later cases have made it clear, however, that the *Taber* case did not unveil a constitutional restriction but simply stated a judicial policy.[15] The legislature should be able to enact a statute which provides for a penalty in the form of punitive damages to be awarded to a plaintiff in a civil proceeding and at the same time provide criminal penalties for the same conduct. In any case, the wisdom of two penalties could be questioned when a second punishment is sought and not, as in these cases, at the time when punitive damages are sought prior to any criminal proceeding. Thus, Indiana Code section 34-4-30-1 contains no constitutional defect, and the award of punitive (treble) damages is available in cases of dishonored checks.

Finally, a question exists as to the amount on which a treble damage award should be based. Indiana Code section 34-4-30-1 states that the aggrieved party may bring an action for an amount equal to three times his "actual damages."[16] The court of appeals in *Maple* made it clear that the recovery is three times the face amount of the check.[17]

The second statutory basis for shifting the costs of suits on dishonored checks is found in Indiana Code section 28-2-8-1. This section provides for recovery of interest, costs, and a reasonable attorney's fee in a suit against a person who issues a check and allows the check to be dishonored for lack of funds, failure to have an account, or lack of an authorized signature. This year the Indiana Legislature made some clarifying amendments to this statute. Prior to amendment, Indiana Code section 28-2-8-1 provided that the holder was entitled to recover if the check was dishonored by a banking institution.[18] This year the Indiana General Assembly expanded this language so that it applies to cases where a check or draft is dishonored by a "financial institution."[19] This language ex-

---

[14]*Id.* at 335.

[15]State *ex rel.* Beedle v. Schoonover, 135 Ind. 526, 35 N.E. 119 (1893); State ex. rel. Scobey v. Stevens, 103 Ind. 55, 2 N.E. 214 (1885).

[16]IND. CODE § 34-4-30-1 (1976 & Supp. 1981).

[17]406 N.E.2d at 334.

[18]IND. CODE § 28-2-8-1 (1976) (amended 1981) provided that: "[a] person who . . . allows the check or draft to be dishonored by a *banking institution* . . . is . . . liable . . . . " (emphasis added).

[19]*Id.* § 28-2-8-1 (Supp. 1981).

pands the coverage of the statute to cases in which instruments are drawn on credit unions and savings and loan associations, entities which have gone into the business of issuing checks or negotiable orders of withdrawal. Secondly, prior to amendment, Indiana Code section 28-2-8-1 provided that a successful plaintiff on a dishonored check was entitled to interest at the rate of eight percent. This rate has been increased to eighteen percent to reflect current market rates of interest.[20] Furthermore, the old Indiana Code section 28-2-8-1 was unclear whether the interest was due from execution of the instrument until a judgment was entered or from execution until the judgment was finally paid. Under the revised statute, it is clear that interest is due for the period until the amount is paid in full.

Under the previous statute, it was not clear whether a successful plaintiff was entitled to recover reasonable attorney's fees if the attorney who prosecuted the action on the check was an employee of the plaintiff. Under the revised statute, the successful plaintiff is entitled to recover reasonable attorney's fees incurred by the holder if the responsibility for collection is referred to an attorney who is not a salaried employee of the holder. Thus, if the action on the check is prosecuted by a lawyer who is a salaried employee of the plaintiff, the plaintiff will not be entitled to an attorney's fee as part of the award. On the other hand, if the attorney is a private practitioner representing the plaintiff-holder, the holder will be entitled to recover a reasonable attorney's fee. Finally, the revised statute provides a minimum recovery. If the holder is successful, he is entitled to a minimum attorney's fee of $100.[21]

B. Treble Damages and Deceptive Advertising

The intentional dissemination of a deceptive advertisement is a Class A misdemeanor under Indiana Code section 35-43-5-3(a)(10). Thus there is the potential for a victim of a false advertisement to recover costs, attorney's fees, and treble damages under Indiana Code section 34-4-30-1 discussed in the previous section. In *McCormick Piano and Organ Co. v. Geiger*,[22] the court of appeals dealt with such a case under a predecessor statute which contained language nearly identical to Indiana Code section 34-4-30-1.[23] In *Geiger*, the defendant published an advertisement stating that a certain

---

[20]This interest rate has been set by statute and is not subject to adjustment as interest rates rise or, as is more likely, fall. Eighteen percent could become punitive, rather than a figure designed to reflect the cost of money, if rates return to levels of earlier years.

[21]*Id.* § 28-2-8-1 (Supp. 1981).

[22]412 N.E.2d 842 (Ind. Ct. App. 1980).

[23]IND. CODE § 35-17-5-12(7) (1976) (repealed 1976).

piano was on sale for $699. The advertisement contained a drawing of the piano on sale. In fact, the drawing was a composite of other pianos which more closely resembled a piano priced at $1,500. Although they did not actually buy a piano, the plaintiffs were misled by the composite and brought suit alleging, among other things, that they were entitled to treble damages under the predecessor to Indiana Code section 34-4-30-1. The case was tried to a jury which gave a judgment to the plaintiff for $14,000.

On appeal, the court concluded that this award was not supported by the proof and remanded the case. In the course of its opinion, the court stated that a recovery of treble damages under this statute is tied to the existence of actual damages which "contemplates common-law damages, i.e., the difference in value between that which the plaintiff parted with and that which he received."[24] The court concluded that the plaintiff's disappointed expectations did not constitute actual damages and could not be the basis for a treble damage award.[25]

This interpretation of the language "actual damages" is quite restrictive. In order to show actual damages and be able to recover treble damages, the plaintiff first must have purchased the falsely advertised product. It makes little sense to require victims to purchase falsely advertised products in order to secure a remedy. This is especially true if the plaintiff discovered the deception after going to the defendant's place of business in reliance on the advertisement. Even if the plaintiff has purchased the product, the plaintiff still must show that the price paid exceeded the value received. According to the court in *McCormick Piano*, the difference between price and value would be "actual damages." In a transaction such as the one in *McCormick Piano*, this difference might be totally unrelated to the false advertising. For example, assume that the piano which was falsely depicted in the advertisement was worth $1,500 and that the piano which was actually on sale was worth $699. If the plaintiff paid $699, the court would find no actual damages even though the plaintiff may have been lured into the transaction by intentionally deceptive advertising. Fortunately, this interpretation of the expression "actual damages" developed in the *McCormick Piano* case focused on the since repealed statute. It may be appropriate to re-think this conclusion when considering the interpretation to be placed on the expression "actual damages" in Indiana Code section 34-4-30-1.

---

[24]412 N.E.2d at 853.

[25]*Id.*

C. Banks as Holders In Due Course

In *St. Paul Fire & Marine Insurance Co. v. State Bank of Salem*,[26] the court of appeals was presented with two questions concerning whether a collecting bank was a holder in due course of a check. In that case *A* drew a check on a Louisville bank in favor of *B* who took the check to the Salem bank where *B* had an account. The Salem bank took the check for collection in a transaction in which Salem applied part of the funds represented by the check in satisfaction of debts *B* owed to Salem, gave some cash to *B*, and gave a credit to *B's* account for the balance. Later the same day, an official of Salem bank began to investigate the transaction and examined the check more carefully. After this inquiry, Salem "froze" the transaction and reversed the credits which had been made to *B's* account. When the check was presented to the Louisville bank for payment, it was dishonored because *A*, the drawer, had ordered payment stopped. Salem brought suit against *A* on his drawer's contract. *A* raised defenses, and Salem asserted the status of a holder in due course who took the instrument free from the defenses.[27] Thus, a question was raised concerning whether the bank was a holder in due course. The trial court entered a judgment for the bank concluding that the bank was a holder in due course, and the drawer appealed.

On appeal the drawer argued that the bank was not a holder in due course for two reasons. First, the drawer argued that the Salem bank had not given value because it had not changed its position in reliance on the check; it simply made bookkeeping entries at the time it took the check for collection. In addition, shortly after taking the check, on the same afternoon, the bank reversed these bookkeeping entries. These arguments ignore the plain language of UCC 3-303(b), which states that a holder takes the instrument for value "when he takes the instrument in payment of or as security for an antecedent claim against any person whether or not the claim is due."[28] In this case the bank took the check partly in satisfaction of *B's* debts owed to the Salem bank. Moreover, the bank gave value under UCC 4-208(1) and UCC 4-209. Under UCC 4-209, a bank has given value to the extent that it has a security interest in an item.[29] Under UCC 4-208(1), a bank has a security interest in an item and accompanying proceeds in the "case of an item deposited in an account to the extent to which credit given for the item has been with-

---

[26]412 N.E.2d 103 (Ind. Ct. App. 1980).

[27]*See* IND. CODE § 26-1-3-305(2) (1976).

[28]*Id.* § 26-1-3-303(b) (1976).

[29]*Id.* § 26-1-4-209 (1976).

drawn or applied."[30] In this case the credit given for the item had been applied to antecedent debts.

Second, the drawer argued that the Salem bank was not a holder in due course because it had taken the instrument with notice of a defense. UCC 3-304(1)(a) provides that a holder has notice of a defense if "the instrument is so incomplete, bears such visible evidence of forgery or alteration, or is otherwise so irregular as to call into question its . . . terms . . . . "[31] In fact, there was evidence on the face of the check that it had been altered. In the space ordinarily used to express the amount of the check in words there appeared "[t]he sum of $100478 and 23 cts" imprinted by a checkwriting machine. In the space where the amount is customarily written in numbers, there was some irregularity. Next to the printed dollar sign were the typed numbers 478.23. The number 100 was typed crudely in an uneven line in front of this number so that the second "0" was over the printed dollar sign. Despite this irregularity, the court of appeals concluded that the trial court had not erred in deciding that the bank did not have notice of a defense at the time it took the check.[32] In reaching this conclusion, the court referred to UCC 3-118(c) which deals with ambiguous terms and rules of construction. That section provides that words control figures unless the words are ambiguous. According to Official Comment 1 to UCC 3-118, the purpose of this rule of construction "is to protect holders . . . by stating rules of law which will preclude a resort to parol evidence for any purpose except reformation of the instrument."[33] This rule permits holders to take instruments confident in the fact that they can be enforced according to the written words. Holders need not be concerned about parol evidence which shows that the amount which appears in numbers is in fact the amount due on the instrument. The amount applied by the checkwriter in this case was considered a written term. Thus the irregularity on the face of the check, which had to do with numerical terms, did not alter the right of a holder to rely on the written term and did not give notice of a defense.

D. Implied Warranties by Non-Merchants

This past year, in *Vetor v. Shockey*,[34] the court of appeals examined the question of whether the warranty of habitability is made

---

[30]*Id.* § 26-1-4-208(1)(a) (1976). Under this language the bank may have been a holder in due course for part of the face amount of the check.

[31]*Id.* § 26-1-3-304(1)(a) (1976).

[32]412 N.E. 2d at 110.

[33]U.C.C. § 3-118, Official Comment 1.

[34]414 N.E.2d 575 (Ind. Ct. App. 1980).

by a non-merchant seller of a house. In that case the defendant, Vetor, purchased the house in question in 1973. In October, 1977, Vetor sold the house to Shockey. Shortly thereafter, Shockey discovered defects in the septic system and sued Vetor claiming the cost of repair to the septic system. The trial court held that Vetor was responsible for the cost of repair on the ground that there was a breach of the implied warranty that the septic system was in proper working order.

Vetor appealed and the court of appeals reversed the trial court and held that a warranty of habitability is not made by a non-builder vendor.[35] The court noted that there is some support in the literature for the proposition that an implied warranty of merchantability should be found in every sale of a used residence whether or not the seller is a merchant.[36] This viewpoint protects the legitimate expectations of consumers who purchase residential property and in doing so make the largest investment of their lives. Despite this argument, courts which have addressed this issue have unanimously held that no warranty of habitability is made in these cases and have concluded that the only basis for recovery should be found in the tort theories of misrepresentation or fraudulent concealment of defects known to the vendor at the time of sale.[37] This conclusion is consistent with the standard applicable to the sale of goods. UCC 2-314 provides for a warranty of merchantability only if the seller is a merchant with respect to the goods sold.[38]

E. Privity Requirement

If a defective product causes personal injury or property damage, there is generally no barrier to recovery against the manufacturer or distributors of the product even if there was no privity between the buyer and those parties. If, however, the buyer's loss can be explained only in economic terms not associated with personal injury or property damage, sometimes described as a loss of the bargain, the Indiana courts have stated that the buyer may recover only against those with whom the buyer had a contract, that is, those with whom the buyer was in privity.[39]

---

[35]*Id.* at 577.

[36]*Id.* (citing Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GA. L. REV. 633, 650-52 (1965)).

[37]Wilhite v. Mays, 140 Ga. App. 816, 232 S.E.2d 141, *aff'd*, 239 Ga. 31, 235 S.E.2d 532 (1977); Tavares v. Horstman, 542 P.2d 1275 (Wyo. 1975).

[38]IND. CODE § 26-1-2-314(1) (1976).

[39]*See* Richards v. Goerg Boat & Motors, Inc., 384 N.E.2d 1084 (Ind. Ct. App. 1979) *discussed in* Bepko, *Contracts, Commercial Law, and Consumer Law, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 107, 110 (1980). *See generally* Industrial Graphics, Inc. v. Asahi Corp., 485 F. Supp. 793 (1980) (Applying Minnesota

This past year the Indiana Court of Appeals reaffirmed this position in *Candlelight Homes, Inc. v. Zornes*,[40] a case in which the principle is made part of the holding and stated more clearly than in previous cases. In *Candlelight Homes*, the buyer purchased a mobile home from Candlelight. The mobile home had been manufactured by Fairmount and sold to Candlelight, its authorized dealer. There was no evidence that Fairmount ever had any dealings with the buyer. The mobile home contained a variety of defects, and the buyer sued both Candlelight and Fairmount. Candlelight was defunct and unable to pay a judgment. Thus, the buyer proceeded solely against Fairmount. After a jury trial, the court entered a judgment in favor of the buyer against Fairmount, and Fairmount appealed. The court of appeals reversed, stating that the Indiana courts have adopted the majority view which requires privity for recovery of the loss of bargain for breach of warranty.[41]

Two exceptions to the privity bar in cases where there is only economic injury should be noted. First, the defendant manufacturer may have participated in the sale process such as by discussing the

---

law, the implied warranty of merchantability which attaches to any party who could reasonably be expected to use or be affected by the goods, was extended to include the manufacturer-wholesaler relationship); Mellander v. W.F. Kileen, 86 Ill. App. 3d 213, 407 N.E.2d 1137 (1980) (The implied warranty of habitability is a contract action requiring privity; therefore, it does not extend to a subsequent purchaser lacking privity with the builder-vendor); Steckman Nat'l Realty and Inv. Corp., Ltd. v. J.I. Case Co., 99 Misc. 2d 212, 415 N.Y.S.2d 946 (1979) (Breach of warranty is contractual remedy requiring privity, which precluded the subsequent purchaser of a defective product from recovery against the manufacturer); Iacono v. Anderson Concrete Corp., 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975) (An action in tort, based on the properly pleaded theory of breach of implied warranty, is proper to recover for property damages, when an action in contract would fail due to lack of privity); A.T.S. Laboratories, Inc. v. Cessna Aircraft Co., 59 Ohio App. 2d 15, 391 N.E.2d 1041 (1978) (a manufacturer may be held liable to an ultimate buyer for damage to the product on the theory of breach of implied warranty even though the manufactured item was purchased from third parties as original buyers in a used conditon); Note, *Recovery of Direct Economic Loss: The Unanswered Questions of Ohio Products Liability Law*, 27 CASE W. RES. L. REV. 683 (1977); Note, Knox v. North American Car Corp.: *Re-examination of Privity of Contract in UCC Implied Warranty Actions*, 11 LOY. CHI. L.J. 637 (1980); Note, *Minnesota Statutory Warranties on New Homes—An Examination and Proposal*, 64 MINN. L. REV. 413 (1980); Casenote, *Sales: Extension of Implied Warranty of Merchantability to Used Goods, 46 Mo. L. REV. 249 (1981)*; Note, *Builders' Liability for Latent Defects in Used Homes*, 32 STAN. L. REV. 607 (1980); Comment, *The Implied Warranty of Habitability: A Dream Deferred*, 48 U. MO. KAN. CITY L. REV. 237 (1980).

[40]414 N.E.2d 980 (Ind. Ct. App. 1981).

[41]*Id.* at 981-82 (citing Lane v. Barringer, 407 N.E.2d 1173 (Ind. Ct. App. 1980); Richards v. Goerg Boat & Motors, Inc., 384 N.E.2d 1084 (Ind. Ct. App. 1979); Thompson Farms, Ind. v. Corno Feed Products, 173 Ind. App. 682, 366 N.E.2d 3 (1972)). In all of these cases, the courts ignored Barnes v. MacBrown, 264 Ind. 227, 342 N.E.2d 619 (1976) which seems to hold otherwise.

goods with the consumer, providing demonstration or inspection opportunities for the consumer, or dealing directly with the consumer concerning problems and corrective measures.[42] This type of participation removes the privity barrier. Second, the manufacturer may have made express warranties to the consumer. The court in *Candlelight Homes* suggests that if an express warranty had been made by the manufacturer to the buyer, there would be a right to sue on the express warranty.[43]

F. Express Warranties

UCC 2-313(1) provides that express warranties may be created in sale of goods transactions by "any affirmation of fact or promise made by the seller to the buyer which relates to the goods . . .," by "any description of the goods . . .," or by any sample or model.[44] The affirmation, promise, description, samples, or models become express warranties only if they are "part of the basis of the bargain."[45] UCC 2-313(2) provides that an "affirmation merely of value . . . or a statement purporting to be merely the seller's opinion . . ." does not create a warranty.[46] In *Royal Business Machines, Inc. v. Lorraine Corp.*,[47] the United States Court of Appeals for the Seventh Circuit examined three problems concerning the UCC language on express warranties. The court's decision may be of importance in future commercial litigation.

1. Affirmations of Fact vs. Puffing.—In *Royal*, the plaintiff sued for breach of a warranty concerning some copier machines provided by the seller, Royal. The trial court found that Royal made and breached a series of express warranties based on statements that the machines were of high quality, that the frequency of repairs was very low, and that the use of the machines in the buyer's rental business would return substantial profits to the buyer.

On Royal's appeal the Seventh Circuit found these statements to be simply expressions of the seller's opinion or puffing, not express warranties.[48] The court explained that the decisive test of whether a representation is a warranty or simply an expression of the seller's opinion is whether the seller "asserts a fact of which the buyer is ignorant or merely states an opinion or judgment on the matter of

---

[42]*See* Richards v. Goerg Boat & Motors, Inc., 384 N.E.2d 1084 (Ind. Ct. App. 1979).

[43]414 N.E.2d at 982.

[44]IND. CODE § 26-1-2-313(1) (1976).

[45]*Id.* § 26-1-2-313(1)(a) (1976).

[46]*Id.* § 26-1-2-313(2).

[47]633 F.2d 34 (7th Cir. 1980).

[48]*Id.* at 42.

which the seller has no special knowledge and on which the buyer may be expected also to have an opinion and to exercise his judgment."[49] The court said that the statement that the copiers were of high quality was simply a statement of opinion or puffing "expected in any sales transaction, rather than a positive averment of fact describing a product's capabilities . . . ."[50] The representation that the frequency of repair was "very low" lacks the specificity of an affirmation of fact upon which a warranty could be predicated, and the representation concerning substantial profits was merely sales talk and the expression of a seller's opinion.[51]

The court made it clear that a finding of an express warranty is a question of fact for the trier of fact.[52] A finding of an express warranty necessarily takes into account the setting in which the statement was made including any trade custom or course of dealing which might give meaning to the statement. For example, the statement that the frequency of repair was "very low" may have had a relatively precise meaning in the setting of this transaction based on general understandings in the copier supply industry. It was not clear if such usages of trade may have influenced the trial judge's decision or whether the court of appeals gave appropriate deference to the trial judge's role in fact-finding with respect to these alleged warranties.

2. *Statements Not Related to the Goods.*—In *Royal*, the trial court also found that the seller, Royal, made a warranty that replacement parts would be readily available for the copier machines and that the cost of supplies would remain low—no more than one-half cent per copy.[53] The Seventh Circuit found that these statements did not create an express warranty. The court emphasized that to create express warranties, the affirmations of fact must relate to the goods sold.[54] The court reasoned that the statement about the availability of parts and the cost of supplies did not relate to the goods and thus could not serve as the basis of an express warranty.

This reasoning leads to an extremely narrow intrepretation of the requirement of UCC 2-313(1) that the affirmation of fact relate to the goods. The court seems to suggest that to relate to the goods,

---

[49]*Id.* at 41.

[50]*Id.* at 42 (citing Thompson Farms, Inc. v. Corno Feed Products, 173 Ind. App. 682, 366 N.E.2d 3 (1977)).

[51]633 F.2d at 42.

[52]*Id.* at 43 (citing General Supply and Equip. Co. v. Phillips, 490 S.W.2d 913 (Tex. Civ. App. 1972)).

[53]633 F.2d at 41.

[54]*Id.* at 42.

the statement must describe the goods or some performance characteristic of the goods. This may ignore the fact that UCC 2-313(1) express warranties are created by affirmations of fact which relate to the goods *or* descriptions of the goods. If the expression "relate to the goods" meant the same as a description of the goods, it would not have been necessary to set forth these two different methods of creating express warranties in the statute. Moreover, it may be important for a buyer to know about such things as availability of parts and supply costs because the utility of the goods may be directly related to these facts. To exclude these commitments from the scope of express warranties on the ground that they do not relate to the goods seems to ignore this commercial need.

Finally, the court's conclusion leaves an important question unanswered. The court addressed this question as if the only liability which could be fixed on the seller was by way of express warranty. The conclusion that a seller of goods could not make commitments concerning the availability of replacement parts or the cost of supplies would be unfortunate. There should be no limitation on the type of commitment a seller can make. The seller should be able to make contract commitments concerning any aspect of a bargain and should not be limited to making express warranties as narrowly defined by this court. Thus, even if the commitments concerning the availability of parts and the costs of supplies were not express warranties within this narrow meaning of UCC 2-313, the statements would still constitute basic contract commitments for which liability could be imposed in a suit on the contract. This may have been a basis for upholding the trial court's decision which the court of appeals did not explore, and it is not clear what the trial court must do on remand.

3. Part of the Basis of the Bargain.—The requirement that the affirmation, promise, description, sample, or model be "part of the basis of the bargain" is the UCC's successor to the requirement in the Uniform Sales Act that the buyer must have relied on the warranty statement.[55] It is clear that because the Sales Act formulation was changed, something less than specific reliance is necessary to prove an express warranty. White and Summers, the authors of the most prominent textbook on the subject, suggest that the new formulation may create a presumption of reliance.[56] In the *Royal* case, the court dealt with one dimension of the element of reliance which is contained in the expression "part of the basis of the bargain." In

---

[55]UNIFORM SALES ACT § 12 provided that "an affirmation of fact . . . is an express warranty . . . if the buyer purchases the goods relying thereon."

[56]J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-4, at 334-35 (2d ed. 1980).

remanding the case for a new trial, the court of appeals emphasized that the arrangement between Royal and the buyer involved a series of sales over approximately an eighteen-month period.[57] On remand the trial court was to consider that the knowledge of the parties and the reliance which the buyer may place on a statement made by a seller's representative may change in light of the circumstances. A buyer may have expanding knowledge of the capacities of the product purchased. This greater knowledge would have to be taken into account in deciding whether the seller's representations were part of the basis of the bargain. The court said that "[t]he same representations that could have constituted an express warranty early in the series of tranactions might not have qualified as an express warranty in a later transaction if the buyer had acquired independent knowledge as to the fact asserted."[58]

G. Statute of Limitations: Sales of Goods

The Uniform Commercial Code provides a statute of limitations for sale of goods transactions. UCC 2-725(1) provides that an action for breach of any contract for sale must be commenced within four years after the cause of action has accrued.[59] UCC 2-725(2) provides that "[a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach."[60] For purposes of this limitation period, a breach of warranty "occurs when tender of delivery is made except . . . where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance . . . . "[61] In that case, the cause of action accrues only when the breach is or should have been discovered.

In *Stumler v. Ferry-Morse Seed Co.*,[62] the United States Court of Appeals for the Seventh Circuit was asked to interpret the expression "where a warranty explicitly extends to future performance of the goods." In *Stumler*, the plaintiff purchased seed from the defendant in December of 1974. The seed was described in a brochure in such a way that there was an express warranty that the seed would produce a particular kind of tomato. The plaintiff took delivery of the seed in March of 1975. At harvest time in September of 1975, the plaintiff discovered that the tomatoes produced from the seed were not in conformity with the express warranty. On June

---

[57]633 F.2d at 44.

[58]*Id.*

[59]IND. CODE § 26-1-2-725(1) (1976).

[60]*Id.* § 26-1-2-725(2).

[61]*Id.*

[62]644 F.2d 667 (7th Cir. 1981)(per curiam).

20, 1979, the plaintiff filed suit for breach of warranty, and the defendants moved for summary judgment on the ground that this claim was time-barred under UCC 2-725(1). The trial court held that the limitation period began at the time of delivery in March of 1975, and entered judgment for the defendant because the suit was not filed until June of 1979, more than four years later.

On appeal, the plaintiff urged that the express warranty extended to future performance and that discovery of the non-conformity had to await the completion of the growing season. Thus, the limitation period did not begin at delivery but began only when the breach was or should have been discovered. The court of appeals disagreed with this argument and affirmed the trial court. The court held that the express warranty concerning the type of fruit to be produced did not explicitly extend to future performance.[63] Before an express warranty explicitly extends to future performance, a warranty must refer to a future time.[64] Examples of warranties that extend to future performance are life-time guarantees, five-year waranties, or 50,000-mile warranties for motor vehicles. The fact that it was necessary for the plaintiff to wait for a period of time before he could determine whether the seed was in conformity with the express warranty did not cause the warranty to *explicitly* extend to future performance.[65]

H. Warranty by Endorsement

Lenders often advance funds to permit the borrower to complete the purchase of goods which are to serve as collateral for the obligation to repay the loan. In some of these transactions, the lender will want to employ some method of policing the transaction to ensure that the secured transaction is properly documented.[66] One such method is to place language on the back of the loan proceeds check which commits the payees, upon endorsement and transfer, to a warranty that the secured transaction is properly documented. In *White Truck Sales, Inc. v. Shelby National Bank*,[67] the court of appeals had occasion to examine the efficacy of such a provision on a check. In that case, the bank loaned $21,575 to Gevedon who was to

---

[63]*Id.* at 672.

[64]*Id.*

[65]*Id.*

[66]IND. CODE § 26-1-9-302(4) (1976) provides that a security interest in a motor vehicle other than inventory held for sale for which a certificate of title is required under Indiana statutes must be perfected by indication of the security interest on the certificate of title. The notation on the certificate of title usually must be requested by the person initiating the assignment of the title certificate.

[67]420 N.E.2d 1266 (Ind. Ct. App. 1981).

use the funds to buy a truck from White. The truck in turn was to serve as collateral to secure Gevedon's obligation to repay the amount of the loan. The loan proceeds were transferred by way of a check made payable to Gevedon and White. On the back of the check there was the following form of endorsement:

> This check together with the down payment in cash and or trade-in constitutes payment in full for 1-1974 *Auto-Car*, Serial No. *AB006HB071483*
> By endorsing, each payee warrants and covenants that an application has been or promptly will be filed for a certificate of title to said property in the name of *William J. Gevedon* subject to a lien in favor of
> The Shelby National Bank, 49 Public Square, Shelbyville, Indiana 46176[68]

This check was endorsed by both Gevedon and White, and the proceeds were apparently applied to the purchase price of the truck. Unfortunately, White failed to note the bank as a lien holder on the assigned certificate of title, and Gevedon sold the truck free and clear of the bank's lien.

After Gevedon's default on the loan agreement, the bank sued and acquired a default judgment against him, but the judgment could not be collected because Gevedon disappeared and had no assets. The bank then sued White on the contract created by White's endorsement of the check. After a bench trial, the court entered a judgment against White for the amount owed on the loan contract, and the court of appeals affirmed.[69] Thus, the Indiana courts seem to have given broad approval to this warranty device and have also established that the remedy for breach of the warranty is the amount due on the loan. The remedy may be different if the seller can show that the value of the goods was always less than the amount due on the loan.

---

[68] *Id.* at 1268.
[69] *Id.* at 1267.

V. Constitutional Law

R. MATTHEW NEFF*

A. *Introduction*

Cases decided in Indiana and in the federal courts with jurisdiction in the Seventh Circuit have confronted many important constitutional issues in the last twelve months. This survey of these recent developments will consider the major cases in the field of constitutional law, with some background discussion being provided, primarily in footnotes.

B. *Due Process of Law*

1. Procedural Due Process.—a. Service of process and notice.—Assuming that the relative importance of the interest bears some relationship to the level of notice required, an anomalous case is *Slebodnik v. City of Indianapolis.*[1] *Slebodnik* involved the Indianapolis City-County Council's incorporation of certain properties into its sanitary district pursuant to statutory provision.[2] Those persons whose property was being incorporated into the sanitary district challenged the validity of the notice by publication. The trial court held that due process notice had been served, and the court of appeals upheld that decision. The plaintiffs challenged the annexation statute as applied, claiming that it denied them a property interest without the best notice possible. The court held that the annexation into the sanitary district involved the government's legitimate exercise of its sovereign power of *taxation*, and not its power of eminent domain.[3] The court therefore found that the taking question was not an issue and that the plaintiffs were not entitled to actual notice. The plaintiffs became liable only for their pro rata share of the cost as a proportional tax,[4] and the threat of a lien asserted against their property for failure to pay these taxes was held to be only an indirect threat, not one requiring best efforts notice pursuant to due process. No specific assessment was levied and no individualized burden or benefit was involved. Therefore, the plaintiffs were enti-

---

*B.A., DePauw University, 1977; J.D., Indiana University—Indianapolis, 1980; Attorney, Krieg DeVault Alexander & Capehart, Indianapolis, Indiana. The author wishes to acknowledge the technical support of Krieg DeVault Alexander & Capehart.

[1]412 N.E.2d 854 (Ind. Ct. App. 1980), *transfer denied*, April 20, 1981.

[2]*See* IND. CODE § 19-2-14-7 (1976) (repealed 1981).

[3]412 N.E.2d at 859.

[4]*Id.* at 860. An assessment for sewage benefits is of little legal distinction from a "pro rata share as a proportional tax."

tled only to notice by publication. *Mullane v. Central Hanover Bank & Trust Co.*[5] was held to be inapposite because that case dealt with court proceedings, and not the mere levy of a tax.[6]

b. Standing.—While standing is a well-known and highly litigated issue in federal courts due in part to the constitutional limitation of federal court jurisdiction, the issue of standing arises less frequently in state courts. The issue did, however, arise during this survey period in *City of Hammond v. Red Top Trucking Company, Inc.*[7] Red Top Trucking challenged the validity of a Hammond ordinance that required excavation sites to be at least three miles from the nearest residential district. Red Top Trucking's application to haul sand was not ratified by the common council as required by the ordinance and a permit was therefore denied. The city claimed Red Top Trucking had no standing to challenge the ordinances because it had no interest in the affected realty, the excavation site. The court held, however, that Red Top Trucking did have standing because the ordinance did not require an interest in property in order to receive a permit.[8]

Because Red Top Trucking had no other means of access to the courts than to pursue a declaratory judgment action, the court decided that it was only fair that judicial review be available under these circumstances. While it is admirable that the court considered the equities of the case in reaching the proper conclusion, its decision does not really address the issue of standing in the sense of what party will most zealously pursue its remedy and what party has been harmed.

c. The right to be heard.—In *Tucker v. Marion County Department of Public Welfare*,[9] the defendant had been denied an opportunity to speak at an ex parte hearing making her children wards of the state. The court of appeals held this to be nonreversible error because the preliminary order making the children wards of the state was merged into the final, full-blown hearing and therefore the claim of deprivation of due process was moot.[10] At first blush this

---

[5]339 U.S. 306 (1950).

[6]412 N.E.2d at 860.

[7]409 N.E.2d 655 (Ind. Ct. App. 1980).

[8]*Id.* at 657-58.

[9]408 N.E.2d 814 (Ind. Ct. App. 1980).

[10]*Id.* at 818. The court stated that: "[W]hile no later hearing can undo an arbitrary action subject to procedural safeguards, neither can the court now go back in time and restore the children to appellants for the amount of time they were wrongfully withheld." *Id.* at 817-18 n.3, (citing Town of Speedway v. Harris, 169 Ind. App. 100, 346 N.E.2d 646 (1976)). The court added that "[W]e do not imply that the final hearing rectified earlier constitutional infirmity, if any." 408 N.E.2d at 818 n.3. Finally, the court denied damages due to the absence of legislative provision therefor. *Id.* at 818.

rule seems sensible; however, it has constitutional flaws. In the first place, carrying the logic of *Tucker* to its fullest extent, as long as a person was granted oral argument in the appellate court, it could be claimed that he was given his due process right to a hearing. Secondly, the deprivation of parental rights during the period between the hearing and the actual adversarial proceeding would seem to be a sufficient deprivation of a property right to require that the right to be heard be granted at all levels of the proceeding.[11] Finally, it would seem that if any decision made at the hearing stage of the proceeding had some binding effect or substantial impact on the outcome of the case, whether direct or indirect, the defendant was in fact denied the right to fully litigate that question. When viewed in the light of these considerations, *Tucker* appears to be a questionable decision, cloaked in the logic of judicial economy.

d. The right to counsel.—The issue of the right to counsel in administrative proceedings was discussed in two recent cases, both of which reveal judicial sensitivity to the intimidating effect of an administrative hearing. In *Sandlin v. Review Board of the Indiana Employment Security Division*,[12] the court built a foundation for its conclusion that due process rights must be accorded in administrative hearings by discarding the distinction between "rights" and "privileges,"[13] and by noting that a legitimate claim to welfare benefits is a property right that may be denied only after due process of law has been afforded.[14] Procedural due process must therefore be accorded in Indiana Employment Security Division proceedings, with the appropriate degree of due process depending upon a balancing of the nature of the governmental function involved and the private interest affected by that action.[15]

Similarly, *Foster v. Review Board of Indiana Employment Security Division*[16] remanded a decision of the Employment Security Division for failure to notify the claimant of his right to be represented by counsel, stating that such was a violation of due process.[17] While the referee is not required to admonish the claimant of his right to counsel, some notice of that right must be given at

---

[11]The right to raise one's children has been held to be more precious than a property right and protected by the fourteenth amendment. *In re* Hewitt, 396 N.E.2d 938, 940 (Ind. Ct. App. 1979). Any proceeding to deprive an owner of property of his interest therein must offer the owner a meaningful opportunity to be heard. Garvin v. Daussman, 114 Ind. 429, 16 N.E. 826 (1888).

[12]406 N.E.2d 328 (Ind. Ct. App. 1980).

[13]*Id.* (citing Board of Regents v. Roth, 408 U.S. 564 (1972)).

[14]406 N.E.2d at 330 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)).

[15]406 N.E.2d 330 (citing Cafeteria Workers v. McElroy, 367 U.S. 886 (1961)).

[16]413 N.E.2d 618 (Ind. Ct. App. 1980).

[17]*Id.* at 620.

some time in the proceeding. The referee must make an independent inquiry when a claimant appears without counsel.[18] A claimant who fails to receive the required notice of right to counsel, however, must show the prejudicial effect of the error. Although the appellant had failed to affirmatively prove prejudice in this instance, the case was remanded for a new hearing on other grounds.[19]

e. Appellate rights.—In *Riner v. Raines*,[20] the plaintiff-appellant was an inmate appealing an order of the Conduct Adjustment Board of an Indiana prison, which had placed the appellant in segregation for fighting. The Indiana Supreme Court held that criminals in prison have been deprived of their liberty *with* due process, but are nevertheless deemed to have retained a residue of protected liberty interests.[21] Although stating that the threat of disciplinary sanction revitalized certain dormant due process requirements, the court concluded that there was no constitutionally protected right to judicial review of the decisions of fact-finding and appellate tribunals presently conducting disciplinary proceedings within the prison system.[22] The court believed that due process was satisfied by the threat of federal action if due process rights were violated,[23] and offered the rationale that the harm suffered by an inmate will have long passed before an appellate court could correct the wrong.[24] While both of these reasons may be technically correct, they are functionally inadequate. The state courts should not rely on federal courts to provide state citizens their rights under the Indiana and federal constitutions, and the fact that a remedy may be a long time coming has never deterred courts from adjudicating rights and remedies and from protecting persons against arbitrary action. While it is true that prison inmates may not have the full comple-

---

[18]This procedure is mandated by 60 IND. AD. CODE § 1-11-3 (1979).

[19]413 N.E.2d at 622.

[20]409 N.E.2d 575 (Ind. 1980).

[21]*Id.* at 577 (citing Wolff v. McDonnell, 418 U.S. 539 (1973); Baxter v. Palmigiano, 425 U.S. 308 (1976)).

[22]409 N.E.2d at 579.

[23]The court was presumably referring to 42 U.S.C. § 1983 (Supp. III 1979), which states in relevant part:

> Every person who, under color of any statute, . . . regulation, . . . or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Compare Riner with Stanley v. Illinois, 405 U.S. 645, 647 (1972), wherein the United States Supreme Court refused to embrace "the general proposition that a wrong may be done if it can be undone."

[24]409 N.E.2d at 579.

ment of constitutional rights, or at least the full degree of the rights available to ordinary citizens, it is well established[25] that they do have some rights and that appellate processes protect those rights which the inmates retain.

f. The right to due process—entitlement, liberty, and property.—Process is not "due" unless some liberty or property interest is at issue. Deciding who is entitled to due process rights created a split in the Indiana Court of Appeals in the past twelve months, and has probably caused much confusion at Fraternal Order of Police meetings. In the case of *State ex rel. Dunlap v. Cross*,[26] a police officer was suspended from the police force for a period of less than ten days. The governing statute[27] states that a police officer suspended for ten days or less has no right to appeal the administrative decision. The reason offered for this provision was that such a policy allowed more swift and effective discipline. The concept of preservation of the "esprit de corps" of the police department has been used in the past to curtail certain rights of police and firemen,[28] in tandem with the rationale that acceptance of a position as a police officer implies assent to certain conditions of continued employment.[29] The Third District Court of Appeals, relying on this logic, held that suspensions of policemen for less than ten days do not involve a property interest,[30] and therefore that there is no right to due process.[31]

An opposite result was reached in *Gerhardt v. City of Evansville*.[32] In that case, the Fourth District Court of Appeals held that allowing the suspension of policemen for up to ten days as provided by statute[33] violated due process. The court held that the right to appeal existed although not provided by statute and even in the

---

[25]"There is no iron curtain drawn between the Constitution and the prisons of this country. . . . [Prisoners] retain right of access to the courts." Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) (citations omitted).

[26]403 N.E.2d 885 (Ind. Ct. App. 1980).

[27]IND. CODE § 18-1-11-3(b) (Supp. 1981).

[28]*See* Kelley v. Johnson, 425 U.S. 238 (1975).

[29]This is based on Justice Rehnquist's infamous rationale that: "[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet." Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974).

[30]Due process is not constitutionally mandated absent two factors: (1) state action and (2) some constitutionally protected liberty or property interest. Wilson v. Board of Ind. Emp. Sec. Div., 385 N.E.2d 438 (Ind. 1979), *cert. denied*, 444 U.S. 874 (1979).

[31]403 N.E.2d at 888.

[32]408 N.E.2d 1308 (Ind. Ct. App. 1980), *aff'd on rehearing*, 416 N.E.2d 142 (Ind. Ct. App. 1981).

[33]IND. CODE § 18-1-11-3(b) (Supp. 1981).

absence of a property interest.[34] The court remanded to the trial court to determine if any property interest was present in the case. Upon rehearing,[35] the city alleged that the holding violated the precedent of *Dortch v. Lugar*[36] and created a conflict of precedent with the *Dunlap* case. The court held that *Dortch* had not been contravened, stating that judicial review is available in order to assure that reasonable administrative procedures are followed, that disciplinary action taken is within the scope of the agency powers, and that the agency acted according to law.[37] The court agreed with the *Dunlap* court that there was no *statutory* right to judicial review of the policeman's case, but went on to disagree that there was no *constitutional* right to review. The court stated that: "We are of the opinion that the lack of a property interest does not lead to the conclusion that there is no right to judicial review."[38] The court went on to claim adherence to the precedent of *Warren v. Indiana Telephone Co.*,[39] in which the Indiana Supreme Court held that judicial review was dependent upon agency action and not upon the existence of a protected property interest, as in the case of right to notice and an opportunity to be heard.[40]

Clearly, the *Gerhardt* court is correct in its analysis that due process is owed to members of the police force, whether suspended for ten days or for more. The *Dunlap* court has reverted to the archaic analysis of rights versus privileges, a standard that has fallen into disrepute in the modern era of constitutional law.[41]

However, due process is constitutionally mandated to be based upon a protected property or liberty interest, and the *Gerhardt* court may have gone too far in its pronouncements. The better anal-

---

[34]408 N.E.2d at 1310 (citing Warren v. Indiana Telephone Co., 217 Ind. 93, 26 N.E.2d 399 (1940)).

[35]416 N.E.2d 142 (Ind. Ct. App. 1981).

[36]255 Ind. 545, 266 N.E.2d 25 (1971). In *Dortch*, the Indiana Supreme Court held that: "We are unable to discover any provision in our constitution *requiring* the guarantee of tenure or rank to employees of a municipal government unit." *Id.* at 578, 266 N.E.2d at 45 (emphasis in original).

[37]416 N.E.2d at 143.

[38]*Id.* at 143 (citing as an example Murphy v. Indiana Parole Bd., 397 N.E.2d 259 (Ind. 1979)).

[39]217 Ind. 93, 26 N.E.2d 399 (1939).

[40]Due process rights to a hearing, after notice, along with a right to be heard were held to be required only where liberty or property interests were implicated. In the case of agency action *absent* a liberty or property interest, only judicial review is required by due process. 416 N.E.2d at 143.

[41]*See* McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892). This rationale was pronounced valueless in Graham v. Richardson, 403 U.S. 365, 374 (1971). *See also* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

lysis is that a policeman does have a protected property interest in his job in that he has a legal basis to believe that his job will continue for an indefinite period. The policeman therefore has a legitimate expectation of continued employment. Once there is a legitimate expectation of continued employment, due process must be accorded the officer/employee. That principle distinguishes this case from *Board of Regents v. Roth*,[42] in which a professor who was hired for a determinate period was held not to have a protected property interest. In that case, however, the professor had no legitimate expectation of continued employment, unlike the policeman in *Gerhardt*.

The due process rights of public employees was also considered in a context outside of the police force. In *Indiana Alcoholic Beverage Commission v. Gault*,[43] the court held that if one's employment is at the will of a government agency, that person has no property interest in employment at a particiular rank. An employee at will is therefore not entitled to the procedural protections linked to a property interest, thus, the court of appeals reversed the trial court's reinstatement of an excise policeman's rank.[44] Again, it would seem that the plaintiff had a legitimate expectation in continued employment. The issue in this case was the right to a due process hearing, not the right to continued employment.[45]

---

[42]408 U.S. 564 (1972). The court phrased the absence of a protected liberty or property interest in this way:

> [T]he terms of respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

Id. at 578 (emphasis in original).

[43]405 N.E.2d 585 (Ind. Ct. App. 1980). The court, construing IND. CODE § 7.1-2-2-12 (1976), held that Mr. Gault was an employee at will in spite of his twenty years of service. The terms of his service lend support to his legitimate expectation of continued employment, which would have arisen if by no other means than custom. To adhere to the letter of the statute, however, would force the conclusion that Mr. Gault was labelled an employee at will, and therefore could acquire no legitimate expectation of continued employment.

[44]405 N.E.2d at 590.

[45]For a general discussion of the procedural due process rights of "at will" employees, *see* Note, *At-Will Public Employee Entitled to Procedural Due Process Hearing Prior to Termination*, 9 SETON HALL L. REV 810 (1978), discussing a New Jersey court's holding to that effect in Nicoletta v. North Jersey Dist. Water Supply Comm'n, 77 N.J. 145, 390 A.2d 90 (1978).

An argument against this theory would be that if an employee at will may be

In *Holbrook v. Pitt*,[46] the question of whether a lessee was entitled to Housing and Urban Development (HUD) rent subsidies was submitted to the Seventh Circuit Court of Appeals. As a result of the relative values at stake, the court held that all tenants should get notice of their right to retroactive subsidy benefits, a written statement telling why such benefits have been denied (if in fact they have), and an opportunity to challenge the sufficiency of the reasons.[47] A hearing was required prior to a final denial of retroactive benefits. For these reasons, the case was remanded to the district court to decide what process was in fact due in this particular instance.[48]

g. Procedural due process and considerations of fairness—challenges to statutes and actions.—In *Mother Goose Nursery Schools v. Sendak*,[49] the defendant Indiana Attorney General refused to approve a contract with the plaintiff to provide nursery school services to children of welfare recipients because the president of the plaintiff corporation had been convicted for filing false income tax returns. The plaintiff alleged that the defendant's action was arbitrary, charging a violation of constitutional rights protected by federal statutory law.[50] The attorney general admitted that the contract was in proper form under the applicable provisions of the Indiana Code[51] and that his denial of approval of the contract was based solely on the president's conviction. Vaulting defenses of qualified immunity, the court held that the attorney general had a duty to approve all contracts lawful in form and content, and that he had no discretion to reject other contracts, for the reason that he is not a party to such contract.[52] In denying the plaintiff's right to contract,

---

fired for any reason, there is no reason to hold a hearing to determine the cause of termination. If, for example, an employee were being fired for reporting violations of health standards or for exercising his constitutional rights, logic would support the employee's argument. This, however, is not the law of Indiana. Campbell v. Eli Lilly & Co., 413 N.E.2d 1054 (Ind. Ct. App. 1980). *But see* Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (retaliatory discharge as a result of claim for workman's compensation held wrongful and actionable).

[46]643 F.2d 1261 (7th Cir. 1981).

[47]*Id.* at 1280-81.

[48]*Id.* at 1281.

[49]502 F. Supp. 1319 (N.D. Ind. 1980).

[50]The plaintiff brought suit under 42 U.S.C. § 1983 (Supp. III 1979).

[51]IND. CODE § 4-13-2-14 (Supp. 1981) states in part: "All contracts and leases shall be approved as to form and legality by the attorney general." This section has been construed to mean that the attorney general may *only* consider contract form and legality in the exercise of his quasi-judicial professional discretion. Citizens Energy Coalition v. Sendak, 594 F.2d 1158 (7th Cir.), *cert. denied*, 444 U.S. 842 (1979).

[52]502 F. Supp. at 1325.

Sendak had denied a right protected by the fourteenth amendment,[53] as well as plaintiff's property interest in its reputation. As a result, Attorney General Sendak was held liable for a violation of the plaintiff's constitutional rights,[54] and monetary damages were awarded, a result which the court had refused in *Citizens Energy Coalition v. Sendak*.[55]

Indiana's mineral lapse statute was challenged in *Short v. Texaco, Inc.*[56] The trial court had declared the Mineral Lapse Act[57] ("Act") unconstitutional, holding that the Act was contrary to due process, equal protection, and the guarantee of just compensation for property taken for public use. The Indiana Supreme Court classified the interest in mineral estates as an interest in real estate and therefore accorded it the "firmest protection of the Constitution from irrational state action."[58] The court found, however, that the standards of notice required by *Mullane v. Central Hanover Bank*[59] were inapplicable with regard to the Act because the Act was self-executing and did not contemplate an ajudication before a tribunal prior to the lapse of the property interest.

2. Void for Vagueness Challenges.—Several statutes were challenged within the last twelve months on the basis of failing the vagueness test. In *Bailey v. State*,[60] the defendant challenged the Indiana robbery statute[61] as vague and overbroad and therefore unconstitutional. In disposing of this challenge, the Indiana Supreme Court quoted *Stotts v. State*[62] which enunciated the test for vagueness. The statute challenged in this case was reviewed on its face. The defendant claimed that the statute allowed for a chain of causation to go on *ad infinitum*.[63] The court, relying on the case of *Colton v. Commonwealth of Kentucky*,[64] equated the vagueness doc-

---

[53]The court found contractual interests to be property within the terms of the fourteenth amendment, and that "[t]he plaintiff in this case had a sufficient interest in the contract to at least be afforded some kind of explanation for its disapproval and also thereafter to be afforded at least a minimal opportunity to confront and refute the charges." *Id.* at 1324-25.

[54]*Id.* at 1326.

[55]594 F.2d 1158 (7th Cir.), *cert. denied*, 444 U.S. 842 (1979).

[56]406 N.E.2d 625 (Ind. 1980).

[57]IND. CODE §§ 32-4-11-1 to -8 (1976).

[58]406 N.E.2d at 627.

[59]339 U.S. 306 (1950).

[60]412 N.E.2d 56 (Ind. 1980).

[61]IND. CODE § 35-42-5-1 (Supp. 1981).

[62]257 Ind. 8, 271 N.E.2d 722 (1971).

[63]412 N.E.2d at 58. The defendant alleged that the absence of a time limitation on the operation of the phrase "results in" made the statute unconstitutionally vague.

[64]407 U.S. 104 (1972) wherein the United States Supreme Court stated that: "The root of the vagueness doctrine is a rough idea of fairness." 407 U.S. at 110, *quoted in* 412 N.E.2d at 58.

trine with fundamental notions of fairness, and decided that the causative terms of the statute denote natural consequences and responses to conduct, and there was therefore no legal uncertainty.

In the case of *F.J. v. State*,[65] F.J. contended that the extension portion of the temporary commitment statute[66] was unconstitutional due to vagueness and overbreadth. The court held that the definitions of "mentally ill" and "gravely disabled"[67] make the statute sufficiently precise to comport with due process. The statute also requires that as a result of the mental illness, the person must present a *substantial risk* that he will harm himself or others or is in danger of harm due to his disability. The court held that this adequately restrained the discretion accorded to courts and put such persons on notice of the statute's criteria.[68]

A school transfer regulation was tested on vagueness principles in *Commission on General Education v. Union Township School of Fulton County*.[69] The school challenged particular applications of the school transfer rules to students alleging that several different factors had to be considered. The court held that in order to provide due process, an administrative decision must be in accordance with previously stated, ascertainable standards.[70] These ascertainable standards were necessary in order to provide a fair warning of the criteria that the administrative body would use, and to provide the courts with guidelines for judicial review.[71] The court stated that it would be unable to review the administrative decision to decide whether it was arbitrary and capricious without these standards.[72]

In *Nova Records, Inc. v. Sendak*,[73] the new Indiana Code sections governing drug paraphernalia,[74] fashioned after the Model Drug Paraphernalia Act as drafted by the Drug Enforcement Administration of the United States Department of Justice, were tested for vague-

---

[65]411 N.E.2d 372 (Ind. Ct. App. 1980).

[66]IND. CODE § 16-14-9.1-9(i) (Supp. 1981) allows a temporary commitment to be extended for not more than 90 days if the attending physician files with the court a report stating that the defendant (1) continues to be mentally ill and (2) is either "dangerous" or "gravely disabled and in need of continuing custody, care or treatment in the facility for an additional period not to exceed ninety (90) days." *Id.*

[67]These terms are defined at IND. CODE § 16-14-9.1-1 (Supp. 1981).

[68]411 N.E.2d at 381.

[69]410 N.E.2d 1358 (Ind. Ct. App. 1980). The principles that were to be used in deciding whether to allow a student to transfer from one school to another were dictated by IND. CODE § 20-8.1-6.1-2 (1976). The court held that the four criteria dictated by this section were the sole standards to be relied upon. 410 N.E.2d at 1362.

[70]410 N.E.2d at 1361 (quoting Podgor v. Indiana Univ., 381 N.E.2d 1274, 1281 (Ind. Ct. App. 1978)).

[71]410 N.E.2d at 1361.

[72]*Id.* at 1362.

[73]504 F. Supp. 938 (S.D. Ind. 1980).

[74]IND. CODE § 16-6-8.5-5 & §§ 35-48-4-8.1 to -8.3 (Supp. 1981).

ness, overbreadth, and certain other constitutional infirmities. The court held that the Indiana version of the Model Drug Paraphernalia Act was constitutional. The court found that the intent requirement of the challenged statute would serve to prevent the levy of criminal penalties upon innocent shippers of legitimate goods, and that any effects on interstate commerce would be incidental and justified.[75]

In the case of *Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates*,[76] the statute challenged as unconstitutionally vague was not a criminal statute, but one which required any person within the Village of Hoffman Estates who sold any "item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs"[77] to obtain a $150 license and file affidavits representing that the owner and every employee authorized to sell such items had never been convicted of drug related offenses. Additionally, the licensee was required to keep records, open to police inspection, for every specified item sold, along with the name and address of the purchaser. Sales to minors were flatly forbidden. After prudently removing the susceptible items from its shelves,[78] Flipside sued the Village in federal court.

The court found that the Village Board of Trustees was attempting to use the licensing procedure to do that which it could not do with a criminal statute. The court held that using a licensing procedure in this manner violated due process even though not linked to criminal penalties. The court found that the standards for enforcing the ordinance were left on an *ad hoc* and subjective basis, which is prohibited under the terms of *Grayned v. Rockford*.[79]

In *Johnson v. St. Vincent Hospital, Inc.*,[80] there were additional challenges to the Indiana Medical Malpractice Act[81] on the basis of unconstitutional vagueness. In the unanimous decision of the Indiana Supreme Court, the statute was found to be constitutionally sufficient on its face. The appellant alleged that the Act should be declared void as vague under article I, section 12 of the Indiana Constitution[82] guaranteeing due course of law for its failure to specify

---

[75]504 F. Supp. at 943.

[76]639 F.2d 373 (7th Cir. 1981).

[77]*Id.* at 374 (quoting Village of Hoffman Estates Ordinance 969-1978 (Feb. 20, 1978)).

[78]*Id.* at 374-75. By avoiding a violation of the ordinance and a subsequent arrest which might require federal court abstention under Younger v. Harris, 401 U.S. 37 (1971), Flipside was able to assure federal court review.

[79]408 U.S. 104 (1972).

[80]404 N.E.2d 585 (Ind. 1980). For a thorough treatment of a number of issues raised in *Johnson*, *see* Harrigan, *Torts, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 425, 425 (1981).

[81]IND. CODE §§ 16-9.5-1-1 to -10-5 (1976 & Supp. 1981).

[82]IND. CONST. art. 1, § 12.

detailed procedures and practices to be followed by the medical review panel. The appellant's inability to cite any authority to support that claim allowed the supreme court to quickly dispose of the argument. The court went on to elaborate and advised, however, that the panel was to function in an informal and reasonable manner, "guided by a trained lawyer who presumptively will not deny to each party a reasonable opportunity to present its evidence and authorities."[83] The function of the medical panel was noted to be only one of recommendation and its finding of fact were held to be merely advisory, and therefore there was no reason to mandate specific procedures.[84]

A confusing case in the vagueness area is *Atkinson v. City of Marion*.[85] In this case, the appellant Atkinson appealed his dismissal from the Marion Police Department for "conduct unbecoming an officer." The appellant challenged this ordinance (based on an Indiana Code section)[86] as unconstitutionally vague, claiming that the ordinance gave insufficient notice of what conduct was prohibited, and failed to offer any guidance to administrative tribunals.[87] The appellant also alleged, and the court acknowledged, that more precision was required in drafting laws that touch upon first amendment issues.[88] In a rather spongy opinion, the court seemed persuaded that the phrase was vague, but then said that the acts at issue here, which included lying and forgery, were so clearly within the phrase that it was constitutional.[89] This is an indication that the court judged the constitutionality of the ordinance as applied, in spite of the fact that the appellant had challenged the ordinance on its face.[90]

C. *Equal Protection of the Law*

1. Generally.—a. Fundamentals of equal protection.—Equal protection[91] has become one of the most effective vehicles for challenging the validity of official action, in part because the standards of equal protection are easily identifiable and allow for reasonable interplay of public policy and official discretion. In the case of

---

[83]404 N.E.2d at 596.

[84]*Id.*

[85]411 N.E.2d 622 (Ind. Ct. App. 1980).

[86]*See* IND. CODE § 18-1-11-3(a)(3) (Supp. 1981).

[87]411 N.E.2d at 625.

[88]*Id.* at 626 n.3 (citing Parker v. Levy, 417 U.S. 733 (1974)).

[89]411 N.E.2d at 627 (quoting *Parker* to the effect that " '[O]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness . . . .' " 417 U.S. at 756).

[90]The court went on to find that the administrative action taken was not " 'arbitrary, capricious and illegal.' " 411 N.E.2d at 628.

[91]U.S. CONST., amend. XIV.

Clark v. Lee,[92] the Indiana Occupational Income Tax Act[93] was declared unconstitutional because it effectively taxed only nonresidents of the state. The Act was drafted in order to retain some of the income taken out of Indiana by employees living across the state border. Residents of Indiana were to receive a credit on the occupational income tax in the amount of income tax paid, and the combined effect of the tax and the credit made the tax fall only on the shoulders of non-residents. The Indiana Supreme Court held that this was a violation of equal protection of the laws under both the Indiana and federal constitutions.[94]

b. Legislation involving suspect classes.[95]—In the case of *Steup v. Indiana Housing Finance Authority*,[96] the plaintiff-appellant sued to have the Indiana Housing Finance Act[97] declared unconstitutional. The court held that providing aid to those families with incomes of up to 125% of the median income of that locale did not violate state and federal equal protection principles.[98] The court noted that legislative distinctions need not be mathematically precise and that no suspect class was involved in this case because distinctions were made on the basis of wealth. The court, after noting that low level scrutiny was to be applied,[99] which requires that the statute bear a rational relationship to permissible governmental purposes, apparently applied a "fair and substantial relationship" test, which has characteristically been applied in intermediate standard equal protection cases such as sex discrimination.[100]

Chief Justice Givan, concurring and dissenting in part, argued that a preferential class had been created by the Act,[101] a class of low income businesses and persons. He agreed that the statute

---

[92]406 N.E.2d 646 (Ind. 1980).

[93]IND. CODE §§ 6-3.5-3-1 to -14 (1976). A decision on this tax had been deferred to the state courts. *See* Blaske v. Bowen, 437 F. Supp. 1056 (S.D. Ind. 1976), *aff'd*, 559 F.2d 1224 (7th Cir. 1977).

[94]406 N.E.2d at 652.

[95]Courts are to give strict scrutiny to those laws and official actions that touch upon fundamental rights or primarily affect suspect classes. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) and its progeny. *See also* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW, 515-687 (1978).

[96]402 N.E.2d 1215 (Ind. 1980).

[97]IND. CODE §§ 5-20-1-1 to -26 (Supp. 1981).

[98]402 N.E.2d at 1223.

[99]*Id. See also* San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[100]In the case of Reed v. Reed, 404 U.S. 71 (1971), the U.S. Supreme Court established a third-tier of equal protection scrutiny for a small class of cases, frequently classifications based on gender: "A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to that object of the legislation . . . .'" 404 U.S. at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). *See also* Craig v. Boren, 429 U.S. 190 (1976).

[101]Specifically, *see* IND. CODE § 5-20-1-5 (Supp. 1981).

should be reviewed with low level scrutiny, but found there to be no rational relationship between the means and the end. The purpose of the statute was to provide housing, not increase the financial or employment status of the poor. For these reasons, he found that there was no rational relationship between the statute and the goals which the statute attempted to achieve.[102]

An equal protection challenge was also one of the many challenges made to the Indiana Medical Malpractice Act.[103] In *Rohrabaugh v. Wagoner*,[104] the appellant challenged the statute of limitations section of the Medical Malpractice Act,[105] arguing that the two year statute of limitations on malpractice actions denied minors equal protection of the law required by the fourteenth amendment to the United States Constitution, by the Indiana Constitution, article I, section 23, and by the due process of law guarantee contained in the Indiana Constitution, article I, section 12. Under the statute, children ages 6 to 21 must commence their action within the same two year period as adults.[106] The court recognized that the equal protection clauses require strict scrutiny only when classifications impinge upon the exercise of a fundamental right or operate to the particular disadvantage of a suspect class.[107] Defining a class by age, however, does not call for strict scrutiny,[108] and so the legislature is not required to provide special time periods for minors between the ages of six and eighteen. Rationality is therefore the required standard, and drawing a line at six year old minors is a rational standard because children of that age can presumably communicate medical complaints to their parents or guardian, who can then commence the action on their behalf.[109]

In *Johnson v. St. Vincent Hospital, Inc.*,[110] the appellants challenged the Medical Malpractice Act[111] on the basis that it subjected malpractice claimants to burdens not borne by other tort claimants and granted corresponding benefits to health care providers in violation of the privileges and immunities clause of article I, section 23 of the Indiana Constitution and the equal protection clause of the fourteenth amendment to the United States Constitu-

---

[102]402 N.E.2d at 1231.

[103]IND. CODE §§ 16-9.5-1-1 to -10-5 (Supp. 1981).

[104]413 N.E.2d 891 (Ind. 1980).

[105]IND. CODE §§ 16-9.5-3-1 to -2 (Supp. 1981).

[106]*Id.* § 16-9.5-3-2.

[107]413 N.E.2d at 893.

[108]*See* San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[109]The court recognized that it might be overruling, *sub silentio*, portions of Chaffin v. Nicosia, 261 Ind. 698, 310 N.E.2d 867 (1974).

[110]404 N.E.2d 585 (Ind. 1980).

[111]IND. CODE §§ 16-9.5-1-1 to -10-5 (Supp. 1981).

tion. The court held that neither classification as a tort claimant nor as a health care provider involved a suspect class[112] and that the statute impinged upon no fundamental right such as voting, procreation or interstate travel.[113] Having therefore dug a grave of low level scrutiny, the court applied the wrong standard.[114] The *ratio decidendi* was the weighing of individual rights against public policy.

As a separate challenge, the appellants alleged that the limitation on damages recoverable by medical malpractice claimants was a violation of equal protection. In rejecting this challenge, the supreme court again completely overlooked the rational relationship standard that is normally applied in low level scrutiny cases and applied a fair and substantial relationship test, citing *Sidle v. Majors*.[115] *Sidle* in turn relied upon *Reed v. Reed*[116] and *Johnson v. Robinson*.[117] *Reed*, however, applied an intermediate level of scrutiny, and *Johnson*, a low level scrutiny. The court also relied upon *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,[118] as authority that the "fair and substantial relationship" test applied.

2. Desegregation.—a. United States v. Board of School Commissioners.[119]—During the survey period, another chapter in the voluminous story of the Indianapolis desegregation case was written. The case, which was filed in 1968, is now in its thirteenth year. The current litigation involves the implementation of the interdistrict remedy which the district court had ordered as a result of its findings that the Housing Authority of the City of Indianapolis, as approved by the Metropolitan Development Commission of Marion County, located all of its public housing projects within the territory of Indianapolis Public Schools (IPS) with a racially discriminatory intent or purpose. The district court in 1978 had found that housing location and certain actions of the Indiana General Assembly were motivated by a racially discriminatory intent and therefore ordered

---

[112]"Neither classification involves a suspect classification such as race, wealth, lineage, alienage or illegitimacy." 404 N.E.2d at 597. Prior to this reference, however, wealth was not a suspect class.

[113]*Id.*

[114]"The fair and substantial relation standard is to be applied here." 404 N.E.2d at 597 (citing Chaffin v. Nicosia, 261 Ind. 698, 310 N.E.2d 867 (1974)).

[115]264 Ind. 206, 341 N.E.2d 763 (1976).

[116]404 U.S. 71 (1971).

[117]415 U.S. 361 (1974).

[118]438 U.S. 59 (1978). In *Duke Power*, the validity of the Price-Anderson Act limiting liability for nuclear accidents was challenged. The United States Supreme Court, however, applied the rational relationship test to uphold the damage limitation. *Id.* at 93.

[119]637 F.2d 1101 (7th Cir.), *cert. denied*, 101 S. Ct. 114 (1980). For a thorough discussion of the Indianapolis desegregation cases see Note, 14 IND. L. REV. 777 (1981).

an interdistrict remedy.[120] Several plans were submitted to the district court in the instant action, with the court deciding on one-way busing of students from the inner city to the outlying school districts.[121] The court rejected the two-way busing plan suggested by IPS because it felt that it lacked the power to order that a suburban child be transported from his school corporation as long as the suburban school corporations retained their identity as distinct legal entities. The court found that there was no evidence that any suburban school corporation had operated anything other than a unitary school system. The busing of inner city school children to the adjoining school districts was held not to be a violation of the equal protection, because students of both races would be bused from the inner city, and within IPS itself.[122] In accomplishing the further revisions of the remedy that the court had ordered, IPS was directed to ignore and abolish its present high school area lines. This order was made on the basis of the belief that the lines were in fact drawn with the discriminatory purpose that the court had found.[123]

In addition, the district court ordered the establishment of certain training programs in order to ease the transition for students and teachers, with the State to bear the expense. Finally, as a matter of fundamental fairness, the court ordered that surplus teachers in the IPS system receive first consideration for hiring by the suburban schools.[124]

b. United States v. Board of School Commissioners,[125] *on appeal.*—On appeal of the district court decision, the Seventh Circuit Court of Appeals reviewed the evidence which the lower court detailed in reaching its finding that the UniGov legislation which had created the new city boundaries and the decision to place public housing within the IPS district was done with a discriminatory intent. In support of this conclusion, the court of appeals noted that "Indiana has for generations pursued a legislative policy that school district lines should grow as the corporate lines of the cities grow."[126] This historical fact was added to the evidence adduced at trial to infer that when UniGov was formed and the school corporations involved were exempted from the provisions of the government merger, the government acted with the intent to permit continued discrimination and aggregation of minority students in the IPS boundaries while preserving the existing characteristics of the

---

[120]Judge Dillin held that such action was taken with a racially discriminatory purpose. 456 F. Supp. 183 (S.D. Ind. 1978).

[121]506 F. Supp. at 663.

[122]*Id.* at 663.

[123]*Id.* at 671.

[124]*Id.* at 674-75.

[125]637 F.2d 1101 (7th Cir. 1980).

[126]*Id.* at 1106.

outlying school corporations. In addition, a 1961 Act of the Indiana legislature[127] had been repealed a few days prior to the enactment of the UniGov legislation. The appellate court took this action to mean that there was discriminatory intent or at least complicity in the formation of UniGov and a desire to keep IPS predominantly black. For these reasons the appellate court affirmed the district court's determination that the 1969 repeal of the 1961 School Annexation Statute was done with a discriminatory purpose.

In reviewing the decision of the district court regarding housing, the court of appeals found that the lower court had failed to determine how much of the current housing segregation within the UniGov boundaries was the result of intentional state action rather than non-discriminatory actions or private acts of discrimination. The appellate court therefore narrowed its review to one issue, the location of public housing in Marion County. In reviewing the evidence, the appellate court agreed with the district court's finding that the decision in the 1960's to locate public housing in Marion County within IPS boundaries was motivated by a segregative intent on the part of state agencies. The sole remaining factor to be considered was whether this intent had substantial interdistrict effects;[128] the Seventh Circuit deferred to the district court's findings and affirmed the decision that the effects of school segregation within IPS were not sufficient to support the two-way busing plan.[129] While upholding the district court's decision to order one-way busing, the appellate court disagreed with the court's reasoning stating that the court *does* have the power to implement a plan which would reassign students from non-IPS to IPS schools, based upon the finding that discriminatory actions by the *state* had significant segregative impact across district lines.[130]

In a strong dissent, Judge Tone extensively reviewed the record, concluding that the real effect of the court's decision was to impose the responsibility on the state to force integration, rather than to *remedy* prior *de facto* segregation:

> If I am right in my belief that the record does not support the findings of discriminatory purpose, the real issue raised by this case is whether otherwise permissible state

---

[127]1961 Ind. Acts, Ch. 186 (School Annexation Statute), *cited in* 637 F.2d at 1106 n.13.

[128]Milliken v. Bradley, 418 U.S. 717 (1974) is the landmark decision on the interdistrict remedy issue. In expressing the opinion of the Court, Chief Justice Burger stated that "[b]efore the boundaries of separate and autonomous school districts may be set aside . . . it must first be shown that there has been a constitutional violation within one district that produces a *significant segregative effect* in another district." *Id.* at 745 (emphasis added).

[129]637 F.2d at 1114.

[130]*Id.* at 1114-15.

> action that does not attempt to remedy the effect of *de facto* segregation is for that reason alone an act of *de jure* segregation. The lesson to be derived from today's decision seems to be that the answer is yes . . . .
>
> Thus a state may not restructure civil government or build public housing in an area in which *de facto* school segregation exists without assuming also the affirmative duty to remedy that segregation.[131]

D. Specific Constitutional Rights and Duties Classified According to Amendment

1. The First Amendment, Including Freedom of Religion.—a. Judicial reluctance to become involved in ecclesiastical matters.—In the case of *Marich v. Kragulac*,[132] the plaintiffs and defendants were battling over who had the right to Serbian Orthodox Church property in East Chicago, Indiana. The trial court dismissed the plaintiff's cause of action for lack of subject matter jurisdiction due to the constitutional prohibition[133] of interference in church matters. Plaintiffs were loyal to the mother church in Yugoslavia, while the defendants sided with a defrocked bishop who headed the local church. The Indiana Court of Appeals held that the relevant inquiry prior to a decision concerning subject matter jurisdiction must be whether the court can resolve the property dispute on the basis of neutral principles of law which do not involve the resolution by the court of ecclesiastical issues, relying on *Presbyterian Church v. Hall Church*.[134] If the court must decide doctrinal propriety, then it has no subject matter jurisdiction.[135] The courts must defer to the resolution of issues of religious doctrine or "polity" by the highest court of a hierarchical church organization.[136]

---

[131]*Id.* at 1129. For an interesting discussion of the essential demise of the *de jure/de facto* distinction and the negative effect of such a demise, *see* Note, *Equal Protection and the Neighborhood School Concept: The Demise of the De Jure-De Facto Distinction*, 55 WASH. L. REV. 735 (1980); Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L. J. 317 (1976).

[132]415 N.E.2d 91 (Ind. Ct. App. 1981).

[133]U.S. CONST. amend. I.

[134]393 U.S. 440 (1969). Resolutions of disputes regarding church property have been the object of several court cases. The neutral principles approach to establishing the identity of the church by relying upon non-doctrinal indices such as charters, constitutions, and by-laws and in the absence thereof, a presumption of majority rule, relates back to Bouldin v. Alexander, 82 U.S. 131 (1872).

[135]Draskovich v. Pasalich, 151 Ind. App. 397, 280 N.E.2d 69 (1972).

[136]415 N.E.2d at 98. "Hierarchical church" has been defined as "(1) those organized as a body with other churches [and] (2) have a similar faith and doctrine (3) with a common ruling convocation or ecclesiastical head . . . ." Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 110 (1952).

"A hierarchical church is generally one in which authority is exercised by laymen

If the church is of a congregational structure, however, the court has the power to decide the issue.[137] The general rule in local schism cases is that the principle of presumptive majority rule applies to the right to control the actions of the title holder of property.[138] While the state has a legitimate interest in the peaceful resolution of disputes over property and in providing a peaceful forum for resolution of such disputes, if the controversy is motivated by disputes over doctrinal practices within the church, the court is barred from resolving the property dispute on the basis of constitutional principle: "If the court must resolve questions of doctrinal propriety in order to determine who has legal control of the property, then it has no jurisdiction of the purported cause of action."[139]

The polity approach to the resolution of church disputes has been accepted in Indiana.[140] *Marich* was consequently remanded to the trial court to determine whether, on the basis of neutral principles of law, the relationship between the local church and the mother church was based on a hierarchical structure. If the trial court determined that the relationship was based on such a structure, the judgment of the hierarchy must be enforced. If, however, the church was found to be congregational in its structure, the court must go on to find which faction represents the local congregation, applying the presumptive majority rule. That presumption may be rebutted if, upon applying neutral principles of law, sources such as statutes, corporate charters, deeds and organizational constitutions of the church disclose the true identity of the local church.[141]

b. The right to attend criminal proceedings.—In *State ex rel. The Post-Tribune Publishing Co. v. Porter Superior Court*,[142] the plaintiff newspaper petitioned for an original writ of mandate or prohibition to overrule the trial court's order of closure of a bail hearing. The Supreme Court of Indiana, assuming *arguendo* that the

---

and ministers organized in an ascending succession of judicatories, while a congregational church is one in which each local church is self-governing." Serbian Orth. Church Cong. of St. Demetrius v. Kelemen, 21 Ohio St. 2d 154, 256 N.E.2d 212, 214 (1970).

Neutral principles methodology has been held to comport with the first amendment. Jones v. Wolf, 443 U.S. 595 (1979).

[137]*See* Serbian Eastern Orth. Diocese for the United States and Canada v. Milivojevich, 426 U.S. 696 (1976).

[138]415 N.E.2d at 101. *See also* Jones v. Wolf, 443 U.S. 595 (1979).

[139]414 N.E.2d at 96.

[140]Smart v. Indiana Yearly Conf. of Wesleyan Methodist Church, 257 Ind. 17, 271 N.E.2d 713 (1971); Price v. Merryman, 147 Ind. App. 295, 259 N.E.2d 883, *cert. denied*, 404 U.S. 852 (1971).

[141]415 N.E.2d at 103. *See generally* Annot., 52 A.L.R.3d 324 (1973).

[142]412 N.E.2d 748 (Ind. 1980).

public and press have a right to attend judicial proceedings,[143] stated that open judicial proceedings are standard and are to be favored.[144] The right to a public trial is guaranteed by the sixth amendment and Indiana Constitution Article I, Section 13,[145] but that right is extended only to the criminal defendant, and the public and news media do not participate in that right.[146] The defendant had concurred in the closure order, and the constitutional rights at issue had therefore been waived. The newspapers claimed that the closure order was invalid here because it was not preceded by a hearing, affording them an opportunity to appear by counsel and offer their arguments against closure. The Indiana Supreme Court, noting that in the recent United States Supreme Court case of *Gannett Co. v. DePasquale*[147] it had been assumed for purposes of argument that there was a first amendment right of the public and the press to have access to pretrial hearings, held that *Gannett* did not require discrete hearings affording the press an opportunity to appear by counsel to contest the closure.[148] However, the court noted that a voiced objection to closure should be considered as a circumstance strongly supporting the necessity of a prior hearing.[149]

Considering the particular facts of this case, the delay caused by

---

[143]The court noted that the same assumption was made by the United States Supreme Court in Gannett Co. v. DePasquale, 443 U.S. 368 (1979). The court found considerable support for this assumption in U.S. CONST. amends. I and XIV, IND. CONST. art. 1, §§ 9 & 12, and IND. CODE § 35-1.1-2-1 (Supp. 1981), which provides in part: "(a) Criminal actions shall be tried publicly in the county where the offense was committed, except as otherwise provided by law."

[144]412 N.E.2d at 750. The court qualified this by noting that the right to a public trial is based upon the rights of the defendant. It has therefore been held that it is not unconstitutional to exclude the press from a trial during the testimony of one witness. *Id.* at 751 (citing Hackett v. State, 266 Ind. 103, 360 N.E.2d 1000 (1977)).

[145]U.S. CONST. amend. VI and IND. CONST. art. 1, § 13.

[146]412 N.E.2d at 750.

[147]443 U.S. 368 (1979).

[148]In discussing the issue, the United States Supreme Court stated:

> Despite this failure to make a contemporaneous objection [by the Gannett reporter], counsel for the petitioner was given an opportunity to be heard at a proceeding where he was allowed to voice the petitioner's objections to closure of the pretrial hearing. At this proceeding, which took place after the filing of briefs, the trial court balanced the "constitutional rights of the press and the public" against the "defendant's right to a fair trial." . . . In short, the closure decision was based "on an assessment of the competing societal interests involved . . . rather than any determination that First Amendment freedoms were not implicated."

443 U.S. at 392-93 (citing Saxbe v. Washington Post Co., 417 U.S. 843 (1974) (Powell, J. dissenting)). The conclusion of the Indiana Supreme Court was that while the facts of the case were not the same, the legal requirement of explicit weighing had been fulfilled.

[149]412 N.E.2d at 751.

a closure hearing would have denied several fundamental rights to the defendant. The court's procedure provided all the safeguards that a hearing would have offered.[150] The judge had announced the outcome of the suppression hearing, and prior to closure he had publicly enunciated the reasons for the closure. The judge's order explicitly enumerated the factors considered regarding the closure and revealed that the hearing would have neither offered more protection nor affected the outcome.[151] For these reasons, the Indiana Supreme Court denied the writ of mandate/prohibition.[152]

2. The Fourth Amendment—Search and Seizure.—a. Administrative searches.—During the survey period, administrative searches were scrutinized by courts in at least two notable cases. In *Andrus v. P-Burg Coal Co.*,[153] the plaintiff Secretary of the Interior sought to force the defendants to allow an inspection of their facilities to check for compliance with the Surface Mining Control and Reclamation Act of 1977 (SMCRA).[154] The defendant had refused to allow the inspectors on his premises without a search warrant. After a preliminary consideration of the constitutionality of the SMCRA, the court held that as a general rule, insofar as administrative searches are concerned, search warrants were required.[155] An exception to this requirement exists if the industry has a history of pervasive regulation so that no genuine expectation of privacy can exist.[156] Coal mine health and safety cases have historically found coal mines to be within this exception.

Judge Dillin of the federal district court found that there was minimal likelihood of an abuse of discretion in this case because the SMCRA regulations specified the frequency and breadth of the search that was to take place.[157] The court was swayed by the argument that surprise searches were necessary to effectuate the purposes of the statute. The SMCRA provides that upon refusal to permit an inspection, the government may seek an injunction.[158] This procedure curtails the harassment that search warrants are designed to prevent. Therefore, the permanent injunction was granted.[159]

---

[150]*Id.* at 751-53.

[151]*Id.* at 753-55.

[152]*Id.* at 755-56.

[153]495 F. Supp. 82 (S.D. Ind. 1980).

[154]30 U.S.C. §§ 1201-1328 (Supp. III 1979). Section 1267 deals specifically with inspections, reports and review of inspections, and their procedures.

[155]495 F. Supp. at 85-86 (citing Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)).

[156]495 F. Supp. at 86 (citing United States v. Biswell, 406 U.S. 311 (1970) and Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970)).

[157]495 F. Supp. 88 (citing 30 C.F.R. §§ 721.11 & 721.12 (1980)).

[158]30 U.S.C. § 1271(c) (Supp. III 1979).

[159]495 F. Supp. at 88. The court stated:

Given the long history of federal regulation of the mining industry, along

In *Wilson v. Health and Hospital Corp.*,[160] the appellant alleged that the defendant Health and Hospital Corporation's warrantless and consentless searches of Wilson's properties violated the fourth amendment.[161] The trial court had held, in granting the summary judgment motion against the plaintiff, that neither the searches nor the notices violated the constitutional rights of the plaintiff.[162]

This case involved a fire which had destroyed one-half of a duplex and the occupant of the other side of the duplex requested that the defendant inspect his residence. After inspecting the occupant's side, the officer entered and inspected the interior of the side that had burned. The second inspection was made without the benefit of a warrant, notice, or consent of the owner.[163] The defense of the Health and Hospital Corporation was that the side that suffered the fire was open and completely unsecured, and that therefore any fourth amendment protection had been waived. The inspector, during the course of his search, found several violations and notified the plaintiff that he must correct them.[164]

In a second separate incident, a health officer employed by the Health and Hospital Corporation visited one of the plaintiff's buildings to perform an inspection. A resident of the building offered to show the inspector around the premises and took the inspector to the basement area. The officer testified that a visual inspection of the basement was possible without moving the basement door because it was standing partially open. Also, some of the apartments in the building were unoccupied and were inspected without obtaining consent or a warrant due to the clear view available to the interior of the apartments.[165]

The condition of these premises formed the basis for the trial court's decision that the dwellings were open to the public view and were therefore not within the plaintiff's reasonable expectation of privacy. The trial court found that since the premises were in an

---

> with the guidelines for inspection and the provision requiring the government to seek injunctive relief upon refusal to allow inspection, the government is not required to obtain a search warrant before being able to inspect the defendant's mining operation.

Id.

[160]620 F.2d 1201 (7th Cir. 1980).

[161]U.S. CONST. amend IV. The appellant based his claim on 42 U.S.C. § 1983 (Supp. 1980), seeking damages, an injunction barring similar future searches, and a declaratory judgment that the ordinance pursuant to which the searches were made was unconstitutional.

[162]620 F.2d at 1206.

[163]*Id.*

[164]*Id.*

[165]*Id.* at 1207

open condition the plaintiff's expectation of privacy was not objectively reasonable.[166]

The appellate court, refusing to accept this rationale, first denied that the facts of this case fell within the "plain view" exception. "The most obvious problem is that it is not even clear in this case what, if any, violations were in plain view of the officer *while he was located where he had a right to be*."[167] The fact that the officer took in some of the information while making routine inspections might allow him to use the information as a basis to form probable cause, but it did not provide a sufficient basis for conducting a warrantless search.[168] For these same reasons, the appellate court denied the use of the "open fields" exception. The open fields exception is inapplicable in a case where there was an actual entry made, because that exception does not permit the warrantless search of open areas within the "curtilage" of a dwelling.[169] Also, the open fields exception is subject to the same limitation that the plain view exception is, that the exceptions allow warrantless *seizures* of evidence visible to the official or to the public in general, but they do not justify warrantless *searches*, or entries into the area in the first place.[170]

The sole evidence offered by the plaintiff in opposition to defendant's motion for summary judgment was that he was the owner of the property at issue in this case. The appellate court held that this was a sufficient impediment to the grant of summary judgment and therefore reversed and remanded the case to the trial court.[171] In this case, the common law and statutory right of private ownership of property and protection against trespass was a sufficient defense to defendant's motion for summary judgment.[172]

Judge Tone dissented to the decision, stating that Mr. Wilson's affidavit made no reference to other matters establishing his reasonable expectation of privacy, which imposed upon the appellate court

---

[166]*Id.* (citing Katz v. United States, 620 F.2d 347 (1967)).

[167]620 F.2d at 1209 (emphasis added). Insofar as the duplex was involved, there was nothing proved to have been in plain view. As to the apartment building, the court was unable to ascertain what was in the inspector's plain view. Regardless, his presence in the basement of the apartment building was not authorized, and the resultant "plain view" should have been excluded from consideration. The court held that the inspector was not where he had a right to be, and that the view was not "inadvertent and unexpected," as required by Coolidge v. New Hampshire, 403 U.S. 433 (1971). 620 F.2d at 1209.

[168]620 F.2d at 1209.

[169]*Id.* (citing Wattenburg v. United States, 388 F.2d 853 (9th Cir. 1968)).

[170]*Id.* at 1209-10 (citing United States v. Bensinger, 489 F.2d 865 (7th Cir. 1973), *cert. denied sub nom.* Felton v. Saiken, 417 U.S. 910 (1974)).

[171]620 F.2d at 1213-14, 1217.

[172]*Id.* at 1212-13 (quoting Rakas v. Illinois, 439 U.S. 128 (1978)).

the duty to decide the case on the basis of the record and not to remand it. Additionally, Judge Tone noted that:

> Given the *Katz* principle that the Fourth Amendment protects people and not places, ownership unaccompanied by either occupancy or any exhibition of an expectation of privacy or an intention to assert a privacy interest should not be sufficient for Fourth Amendment protection. Here the plaintiff displayed an utter indifference to privacy.[173]

b. The right to consent and waive fourth amendment protection.—In *Brames v. State*,[174] the Indiana Supreme Court held that a defendant may not object to the violation of a third party's constitutional rights, unless the violation involved an area in which the defendant had a reasonable expectation of privacy.[175] The court held that the defendant, although not the owner of the property, had a reasonable expectation of privacy at his parent's cottage. However, the consent of a person who has common authority over premises or effects is valid against the absent person with whom the authority is shared.[176] In this case, the defendant's parents had granted the police permission to search the premises, they had consented to the search of property shared with the defendant, and the police search was therefore constitutional.[177]

c. High school searches.—In the Seventh Circuit case of *Doe v. Renfrow*,[178] the plaintiff Doe, a junior high school student filed civil rights complaints on the basis of strip searches and the sniffing of her person by police dogs searching for drugs at her school. In a textbook case of abuse of police power, 2,780 students of the school were subjected to canine sniffing. Judge Sharp of the Northern District of Indiana granted the defendant school officials summary judgment on the issue of monetary damages for the body search of the plaintiff Doe on the basis of qualified immunity.[179] The officials were held not liable for damages because of an absence of proof of malice and their subjective and objective good faith had not been challenged by the complaint.[180] Judge Sharp did hold the plaintiff entitled to declaratory relief that the nude body search was made without

---

[173]620 F.2d at 1219.

[174]406 N.E.2d 252 (Ind. 1980).

[175]*Id.* at 254 (citing Katz v. United States, 389 U.S. 347 (1967)).

[176]United States v. Matlock, 415 U.S. 164 (1974).

[177]406 N.E.2d at 255.

[178]631 F.2d 91 (7th Cir. 1980), with additional dissents printed at 635 F.2d 582 (7th Cir. 1980).

[179]475 F. Supp. 1012 (N.D. Ind. 1979).

[180]631 F.2d at 92 n.3.

a finding of reasonable cause and in violation of the fourth amendment.

It is difficult to conceive how the judge could have found subjective and objective good faith in the strip search of a junior high school student. It is well settled that students entering school premises do not leave their constitutional rights at the door.[181]

The court of appeals adopted Judge Sharp's opinion as their own, with the exception that the court held that the defendant school officals were not immune from liability arising out of the nude search based on the good faith defense articulated in *Wood v. Strickland*.[182] *Wood* stated that school officials who act "in good-faith fulfillment of their responsibilities and within the bounds of reason under all circumstances [but] not in ignorance or disregard of settled indisputable principles of law would be protected from liability actions."[183] The Seventh Circuit Court of Appeals is to be commended on its reaffirmance of Judge Sharp's use of the principles of law and its disagreement on their application in this case.

3. The Fifth Amendment; Condemnation; Taking, and Self Incrimination.—a. What constitutes a taking under the fifth amendment.—In the case of *Jaymar-Ruby, Inc. v. FTC*[184] the federal district court ruled that the mere risk of disclosure to the public or to competitors of trade secrets given to the FTC, which in turn gives the information to state attorneys general under a promise of confidentiality, did not fall within the "taking" terms of the fifth amendment.[185] The court presumed that governments will honor their commitments to keep confidential information secret, relying on the authority of *Exxon Corporation v. FTC*.[186] If an improper disclosure did occur, resulting in competitive injury, it would be, at worst, a collateral consequence of FTC cooperation with state inquiries and no fifth amendment guarantee would be violated.[187] Even

---

[181]Goss v. Lopez, 419 U.S. 565 (1975); Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969). The large number of students searched would seem to make the facts all the more clear.

[182]420 U.S. 308 (1975). "A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." 420 U.S. at 322.

[183]631 F.2d at 92 (quoting Wood v. Strickland, 420 U.S. 308, 321 (1975)).

[184]496 F. Supp. 838 (N.D. Ind. 1980).

[185]U.S. CONST. amend. V.

[186]589 F.2d 582, 590-91 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 943 (1979). The D.C. Circuit indulged in the presumption that information revealed to Congress would be held confidential, and that if disclosure were made, the plaintiff would have a remedy against the particular individual.

[187]496 F. Supp. at 846.

presuming that some disclosure would occur, there could not be a taking until the disclosure was made, and only at that time would a cause of action for damages be instituted. The mere threat of some future disclosure may not form the basis to elude the jurisdiction of the FTC.[188]

b. Self incrimination and the right to assert fifth amendment protection.—In *Martincich v. City of Hammond*,[189] the plaintiff appealed the trial court's affirmance of the Department of Public Works' action dismissing him from the Hammond Police Department. The court held that the availability of the fifth amendment privilege against self incrimination is not dependent upon whether the proceeding is civil, criminal or administrative, but rather whether a statement is or may be inculpatory.[190] The court stated that the purpose of the fifth amendment is to prevent *forced* self incrimination, not to protect information desired to be kept private. The court noted, however, that no inculpatory statements were made by Martincich and that since this was a disciplinary action, and therefore no threat of criminal prosecution existed, the plaintiff had no fifth amendment right protection. Martincich was told that he could refuse to testify at the administrative hearing but that if he exercised the right of refusal he would be precluded from testifying later.[191] The holding in this case violates the well known principles that have developed concerning the fifth amendment and the constitutional protection against self incrimination.[192]

---

[188]*Id.* at 846-47.

[189]419 N.E.2d 240 (Ind. Ct. App. 1981).

[190]*Id.* at 243 (citing Haskett v. State, 255 Ind. 206, 263 N.E.2d 259 (1970)).

[191]The court stated that this had the effect of forcing a decision at the beginning of the hearing as to whether he would testify or not. 419 N.E.2d at 243-44.

Martincich was not, in the eyes of the court, under duress to testify, in spite of the fact that it was possible he would lose his job if he did not offer a rebuttal to the charges. Logically, Martincich was forced to testify, but the absence of a threat of criminal prosecution undercut his fifth amendment right. Martincich was dismissed, however, for alleged fencing activities. Evidence admitted at the administrative hearing would have been admissible at a criminal trial.

[192]*See* Green v. State *ex rel.* Dept. of State Revenue, 390 N.E.2d 1087 (Ind. Ct. App. 1981). In *Green*, the court stated

> It is basic that the fifth amendment protection against self-incrimination exists only in criminal actions. The protection is generally not available in civil proceedings unless there are criminal overtones. . . . [T]he legislature has created a law enforcement system in which criminal and civil elements are inherently intertwined. Thus, the line between civil and criminal proceedings is difficult to draw. *Donaldson v. U.S.*, (1971) 400 U.S. 517, 91 S. Ct. 434, 27 L.Ed.2d 580, drew the line in the federal system at the recommendation to the Department of Justice for prosecution. In Indiana, we cannot draw such a "bright-line" between the civil and criminal. The Department, unlike the IRS, cannot represent itself in court in enforcement proceedings,

4. The Eighth Amendment Prohibition Against Cruel and Unusual Punishment.—In *Chavis v. Rowe*,[193] a six month confinement in a five by seven foot cell with four other prisoners was held to violate the plaintiff's eighth amendment rights,[194] the conditions being found to transgress modern standards of dignity, humanity and decency.[195] The test for the plaintiff's constitutional action based on the eighth amendment is a showing that prison officials intentionally inflicted excessive or grossly severe punishment on a prisoner or that the officials knowingly maintained conditions so harsh as to shock the conscience.[196] The court held that the plaintiff's placement in a five by seven foot cell with four other men did constitute an eighth amendment violation because it violated the court's perception of standards of civilized incarceration.[197] The degeneration of the prisoners under these conditions was probable and self-improvement was unlikely.[198] For these reasons, the judgment for defendant was reversed and remanded to the trial court.[199]

The U.S. Supreme Court has recently taken up consideration of cell space and the eighth amendment in the case of *Rhodes v.*

> but rather must make use of the offices of the Attorney General for this purpose. The Attorney General, under IC 6-3-6-11, also has concurrent jurisdiction with the local prosecutor to prosecute criminal tax cases. Thus, unlike the federal system, the Attorney General's office is active in the original subpoena enforcement and consequently its first involvement cannot be the determinative factor. We, however, feel that a recommendation to the Attorney General for prosecution (or the initiation of such an action) can serve as notice that the process has become criminal.

Id. at 1090.

[193]643 F.2d 1281 (7th Cir. 1981).

[194]U.S. CONST. amend. VIII. The proscription of cruel and unusual punishment applies to state correctional facilities. *See* Lock v. Jenkins, 464 F. Supp. 541 (N.D. Ind. 1978).

[195]643 F.2d at 1291 (citing Hutto v. Finney, 437 U.S. 678, 685 (1978)).

> This court recently described the test for a § 1983 action charging prison officials with violating the Eighth Amendment as requiring plaintiff to show that prison officials intentionally inflicted excessive or grossly severe punishment on him or that the officials knowingly maintained conditions so harsh as to shock the general conscience. *Stringer v. Rowe*, 616 F.2d 993, 998 (7th Cir. 1980).

643 F.2d at 1291.

[196]643 F.2d at 1291.

[197]*Id.* (citing Battle v. Anderson, 564 F.2d 383, 393 (10th Cir. 1977)).

[198]*Id.* The Tenth Circuit has ordered the Oklahoma Department of Corrections to provide each prisoner with a minimum of sixty square feet. Battle v. Anderson, 564 F.2d 388, 393 (10th Cir. 1977). "Punitive isolation" was held to violate the eighth amendment in Hutto v. Finney, 437 U.S. at 688. The Seventh Circuit also noted that overcrowding may state a due process claim, citing Bell v. Wolfish, 441 U.S. 520, 542 (1979).

[199]643 F.2d at 1292.

Chapman.[200] While eighth amendment cases are characteristically fact-sensitive, this most recent case serves to reveal the current attitude of the Court regarding prison conditions:

> The five considerations on which the District Court relied also are insufficient to support its constitutional conclusion. The court relied on the long terms of imprisonment served by inmates at SOCF; the fact that SOCF housed 38% more inmates than its "design capacity"; the recommendation of several studies that each inmate have at least 50-55 square feet of living quarters; the suggestion that double celled inmates spend most of their time in their cells with their cellmates; and the fact that double celling at SOCF was not a temporary condition. . . . These general considerations fall short in themselves of proving cruel and unusual punishment, for there is no evidence that double celling under these circumstances either inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of crimes warranting imprisonment.[201]

After a review of the District Court's findings of fact, Justice Powell and the majority reversed the trial and appellate courts' conclusion that double-celling violated the eighth amendment. The facts in *Rhodes*, however, were not nearly as egregious as those in *Chavis*. *Chavis* appears to retain its vitality.

5. *The Relationship Between State and Federal Governments and the Tenth Amendment.*—In *State v. Andrus*[202] the Surface Mining Control and Reclamation Act of 1977[203] ("SMCRA") was held by the federal district court to be unconstitutional. The constitutionality was challenged by the plaintiffs on several bases, notably that the provisions exceeded the regulatory authority of the federal government based on the commerce clause, that the provisions were in violation of the tenth amendment,[204] and that the statute provided for a taking of property without just compensation in violation of due process and the taking clause requirements of the fifth amendment.[205]

---

[200]101 S. Ct. 2392 (1981).

[201]*Id.* at 2399.

[202]501 F. Supp. 452 (S.D. Ind. 1980), *rev'd sub nom* Hodel v. Indiana, 101 S. Ct. 2376 (1981).

[203]30 U.S.C. §§ 1201-1328 (Supp. 1980).

[204]U.S. CONST. amend. X.

[205]*Id.* This claim was based on the contention that the regulation was not reasonably related to the legitimate federal goals of controlling interstate commerce and the effect of environmental problems on commerce. 501 F. Supp. at 455.

Addressing the commerce clause challenge, the court stated that its inquiry into commerce clause issues must be a two-fold inquiry:

> First, this Court must "determine whether the particular activity [facet of surface mining operations] regulated or prohibited is within the reach of the federal power," *United States v. Darby*, 312 U.S. 100, 120-21 . . . (1941), that is whether there is a rational basis for Congress to conclude that the particular facet of surface mining operations regulated or prohibited has a substantial and adverse effect on interstate commerce. . . . Second, "the means chosen," . . . must be "reasonably adapted" or "plainly adapted" to the legitimate end of removing the substantial and adverse effect on interstate commerce.[206]

The court held that strip mining in Indiana has a negligible effect on interstate commerce and cited extensive authority to this effect.[207]

Additionally, the provisions of the SMCRA requiring that the original contour of the land be restored were so marginally based on interstate commerce that the court held that they were not within the commerce power of the federal government and were therefore struck down.[208] The provisions requiring strip miners to undertake certain post-mining land uses as a precondition to the grant of a permit to mine were held to be unrelated to removing the substantial adverse effects on interstate commerce and therefore exceeded the federal government's authority.[209]

Arguing also on tenth amendment[210] grounds, the plaintiffs contended that the provisions which required a state to submit a program in full conformity with the SMCRA and imposing the Secretary's regulations in default thereof violated the sovereignty of the states. Plaintiffs additionally contended that the provisions challenged were actually land use controls, traditionally a responsibility of state government and that the SMCRA therefore offended the spirit of the tenth amendment as enacted. Citing *National League of Cities v. Usery*,[211] the district court held that the tenth amendment formed a limitation upon the interstate commerce power of the federal government, that such limitation had been violated, and that the provisions im-

---

[206]501 F. Supp. at 458.

[207]*See* the detailed discussion of the evidence to this effect at 501 F. Supp. at 460-61.

[208]501 F. Supp. at 461.

[209]*Id.*

[210]U.S. CONST. amend. X.

[211]426 U.S. 833 (1976).

pinging upon the powers of the state government were therefore unconstitutional.[212]

Concerning the provisions that the federal government, in the absence of the state's affirmative action, could promulgate regulations that would be administered in Indiana, the court stated that:

> This Court must view the portions of the Act challenged by plaintiffs as if the Federal Government were going to administer the Act under a Federal program in Indiana, for if sovereign functions of a State are dictated and confined by the Act under threat of a federal program, it is not relevant that a State may ultimately "choose" under threat of federal usurpation of a sovereign function to have a State program, make such decisions, and structure its government accordingly.[213]

In discussing the plaintiffs' allegation that the federal legislation was irrational and essentially a violation of substantive due process, the court concluded that:

> There is no rational basis to support that the discriminatory treatment toward plaintiffs and the States in the Midwest, or that the failure to grant plaintiffs equal variances, furthers a legitimate "national interest." For selective or discriminatory Federal legislation to be valid under the Fifth Amendment, there must be an overriding national interest justifying such difference in treatment, and there must be "a legitimate basis for presuming that the rule was actually intended to serve that interest."[214]

Finding these overriding national interests to be absent, the court held that the act was irrational, arbitrary, and capricious, and therefore unconstitutional.[215]

Addressing the plaintiffs' argument that the SMCRA took their property without just compensation as required by the fifth amendment, the court found that it was technologically impossible to restore prime farmland to prior levels of yield, that consequently, the value of the mineral interest was destroyed, and that the Act therefore constituted an unconstitutional taking.[216]

Finally, certain provisions that addressed procedural aspects of the Act were found to be unconstitutional. One requirement, that in

---

[212]501 F. Supp. at 462-68.

[213]*Id.* at 464.

[214]*Id.* at 469 (quoting Hampton v. Mow Sun Wong, 426 U.S. 88 (1976)).

[215]501 F. Supp. at 469.

[216]*Id.* at 471.

order to gain a hearing on violations the defendant must pay the proposed penalty into an escrow account, was held to violate procedural due process guarantees.[217]

The district court, unfortunately, was reversed by the U.S. Supreme Court in the case of *Hodel v. Indiana*.[218] Justice Marshall, delivering the opinion of a unanimous Court, rebutted almost all of Judge Noland's decision. The Court refused to assess the quantum of strip mining impact on interstate commerce, deferring to Congress' decision and noting that under a long line of cases only incremental effect is required.[219]

The Court also nullified the decision as premised on the tenth amendment:

> The District Court also held that the 21 substantive statutory provisions discussed above violate the Tenth Amendment because they constitute "displacement or regulation of the management structure and operation of the traditional governmental function of the States in the area of land use control and planning . . . ."
>
> . . .
>
> Like the provisions challenged in *Virginia Surface Mining*, the sections of the Act under attack in this case regulate only the activities of surface mine operators who are private individuals and businesses, and the District Court's conclusion that the Act directly regulates the States as States is untenable. This Court's decision in *National League of Cities* simply is not applicable to this case.[220]

The glaring error of this decision is that the Supreme Court failed to consider the provisions of the SMCRA which required the state to promulgate regulations regarding strip mining, or in the absence

---

[217]*Id.* (citing Fuentes v. Shevin, 407 U.S. 67 (1972)).

[218]101 S. Ct. 2376 (1981). For a detailed discussion of arguments for and against the Surface Mining Control and Reclamation Act, *see* Note, *The Constitutionality of the Federal Surface Mining Control and Reclamation Act of 1977*, 13 IND. L. REV. 923 (1980).

[219]*Id.* at 2386.

[220]*Id.* at 2385-86. The court quoted Stafford v. Wallace, 258 U.S. 495, 521 (1922), which stated:

> "Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of danger and meet it. This court will certainly not substitute its judgment for that of Congress unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent."

Id. at 2384.

of such regulations required the State to enforce federal regulations imposed by fiat. This is the encroachment on state government that *National League of Cities v. Usery*[221] sought to prevent.

Finally, the Court decided that the District Court had erred in searching for an overriding national interest as a justification for violating equal protection.[222] Justice Marshall held that since no fundamental right or suspect class was involved, only low level scrutiny was due and the Court should defer to Congressional judgment. The fifth amendment challenge was sidestepped by the Court's conclusion that no particular piece of property had been taken under the Act, and that the plaintiffs claimed a taking by the mere force of statutory enactment, which it deemed insufficient.[223]

6. Personal Rights Based on the Aura of Combined Constitutional Amendments.—In a 1980 case decided by the District Court of the Northern District of Indiana, *Gary-Northwest Indiana Women's Sevices v. Bowen*,[224] the Indiana criminal statute regulating abortions was challenged. The plaintiffs were not presently being prosecuted because the criminal action against the plaintiffs had been dismissed before the evidentiary hearing and as a result, the defendants' abstention argument failed. The plaintiffs claimed that the Indiana requirement that a mother who is having an abortion in the second trimester be hospitalized is not "reasonably related to maternal health" and therefore in violation of the *Roe v. Wade*[225] standard for the second trimester.[226]

The plaintiffs argued that certain early second trimester dilation and evacuation (D & E) abortions are so safe that applying Indiana's hospitalization provisions to them does not reasonably relate to maternal health. The court stated that it was bound to the *Roe* division at the end of the first trimester, when the risk of having an abortion is less than the risk of having a child and the court therefore cannot affect the line of demarcation.[227] This is an unfortunate by-product of *Roe v. Wade*, because it binds the precedent to a specific time, unaffected by advances in medical technology. While the court notes that two cases[228] have followed the plaintiffs' argu-

---

[221]426 U.S. 833 (1976).

[222]101 S. Ct. at 2386.

[223]*Id.* at 2387.

[224]496 F. Supp. 894 (N.D. Ind. 1980) (construing IND. CODE §§ 35-1-58.5-1 to -7 (1976)).

[225]410 U.S. 113 (1973).

[226]496 F. Supp. at 898-99.

[227]The district court premised this standard on Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

[228]Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980), and Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft, 483 F. Supp. 679 (W.D. Mo. 1980), *cited at* 496 F. Supp. at 899.

ment by stating that the dividing line is not the first and second trimester, but the point where abortions become more dangerous than childbirth, the Northern District of Indiana refused to follow this precedent.

The second tack taken by the plaintiffs was that the hospitalization requirement did not further the real standards of *Roe*. The unavailability to some indigent mothers of hospital care during abortion proved that the regulation did not relate to maternal health. The court easily sidestepped this argument by noting that Indiana is not required to guarantee the practical availability of abortions to all indigent women.[229] The court held that the obstacle in this case was not the required hospitalization, but the indigency. Ultimately, the court held that the hospitalization was reasonably related to the promotion of maternal health, and therefore was in accord with *Roe v. Wade*.[230]

E. Conclusion

The cases reviewed in this Survey Article reflect a continued disuse of state constitutional law. Whether recent changes in the relationship of federal and state government will affect this situation is unclear. There remains a strong argument in favor of the disuse of state constitutional law in the desire to provide consistency of privilege and immunity, even in the face of disparate application of law to fact.

A second thread running through recent Indiana constitutional cases is spun more by default—the preoccupation of the Indiana Supreme Court with criminal appeals. It is hoped that this survey period reveals a new trend of Indiana Supreme Court guidance in non-criminal areas.

---

[229]496 F. Supp. at 900 (citing Williams v. Zbaraz, 448 U.S. 358 (1980) and Harris v. McRoe, 448 U.S. 297 (1980) (upholding the constitutionality of the Hyde Amendment)).

[230]*Id.* at 902.

VI. Criminal Law and Procedure

LYNNE D. LIDKE*

A. *Death Penalty*

In *Judy v. State*,[1] the supreme court conducted its initial review,[2] unfortunately in a non-adversarial context,[3] of the present Indiana death penalty statute.[4] The *Judy* case reached the supreme court by the infrequently used route of the defendant's petition to determine the status of his appeal filed by the defendant's court-appointed counsel.[5] The defendant had sought to discharge his counsel, waive his right to appeal, and essentially terminate the appeal process.[6] His counsel recognized the professional ethics dilemma posed by the conflict between their duty to comply with a voluntary, knowing, and intelligently made request of a client, and their duty as court-appointed counsel to give effect to Indiana Code section 35-50-2-9(h), which requires review by the supreme court of the imposition of every death sentence.[7]

The court determined, on the basis of the record and a hearing before the court at which the defendant appeared, that the defendant could and did intelligently, knowingly and voluntarily waive his right to appeal his four murder convictions but that Indiana Code section 35-50-2-9(h) precluded the defendant from waiving a review of the death penalty sentence itself.[8] The court's ensuing review of the defendant's death sentencing thus proceeded with the defendant's counsel being "released from any further obligation with regard to the review"[9] and without their "filing of any brief concerning the Court's review of the death sentence."[10]

---

*Lynne D. Lidke is a third-year student at the Indiana University School of Law, Indianapolis and a Note and Development Editor of the *Indiana Law Review*. The author wishes to thank Mr. Owen M. Mullin along with friends and associates of the *Review* for their generous assistance in the preparation of this article.

[1]416 N.E.2d 95 (Ind. 1981).

[2]*Id.* at 105.

[3]*Id.* at 111 (Prentice, J., concurring in result). *See also* Brewer v. State, 417 N.E.2d 889, 895 (Ind. 1981).

[4]IND. CODE § 35-50-2-9 (Supp. 1981).

[5]416 N.E.2d at 96.

[6]*Id.* at 96, 101. This finding appears reconcilable with the defendant's oral declaration at his waiver hearing before the supreme court that "I feel that it's my right that I can proceed with the appeal." *Id.* at 101.

[7]*Id.* at 96-97.

[8]*Id.* at 97, 101-02.

[9]*Id.* at 101.

[10]*Id.*

With the case in this posture, the court examined the sentencing of the defendant in light of recent United States Supreme Court decisions,[11] the Indiana Constitution,[12] and the relevant Indiana statutes.[13] Both the death sentencing procedures themselves and their application in the particular case at bar were found to be unexceptionable.[14] The statutory sentencing procedures were "consistent and in full compliance with those required by the United States Supreme Court in *Gregg v. Georgia* and *Profitt v. Florida*, and thus not violative of the eighth and fourteenth amendments to the United States Constitution."[15] The sentence of death imposed in the *Judy* case was "not manifestly unreasonable" in that a " 'reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed.' "[16]

At trial, the defendant had been convicted of the murder of Terry Chasteen by virtue of evidence showing that he had killed Ms. Chasteen while committing or attempting to commit rape.[17] He had also been convicted of the murders of Misty Zollers, Stephen Chasteen, and Mark Chasteen through evidence showing that his killings of the children were knowing or intentional.[18] The jury recommended the death penalty for each conviction in accordance with the detailed standards imposed by Indiana Code section 35-50-2-9.[19] The jury and court found beyond a reasonable doubt that two aggravating circumstances existed and that no outweighing mitigating circumstances existed.[20] One aggravating circumstance was found to be the intentional killing of Terry Chasteen while committing or attempting to commit rape, and the second was found to be the commission by the defendant of " 'another murder, at any time, regardless of whether he [had] been convicted of that other murder.' "[21]

---

[11]*E.g.*, Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976). *See also* Woodson v. North Carolina, 428 U.S. 280 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

[12]416 N.E.2d at 105 (discussing IND. CONST. art. 1, § 18).

[13]IND. CODE § 35-42-1-1 (Supp. 1981) (defining the crime of murder); *id.* § 35-50-2-3 (providing the sentencing alternatives for the crime of murder); *id.* § 35-50-2-9 (providing the substantive standards and procedural steps to be followed in imposing the death sentence).

[14]416 N.E.2d at 108.

[15]*Id.*

[16]*Id.* at 107, 108 (quoting IND. R. APP. REV. SENT. 2).

[17]*Id.* at 102 (quoting IND. CODE § 35-42-1-1(2) (Supp. 1981)).

[18]416 N.E.2d at 102 (quoting IND. CODE § 35-42-1-1(1) (Supp. 1981)).

[19]416 N.E.2d at 108-09.

[20]*Id.* at 109, 110.

[21]*Id.* at 109 (quoting IND. CODE § 35-50-2-9(b)(8) (Supp. 1981)). Thus, as opposed to the statutorily provided aggravating circumstances such as those referring to the killing of certain classes of victims or to the prison status of the defendant at the time of the killing, the aggravating circumstances in the *Judy* case were largely provided

That neither the jury nor the trial judge detected any outweighing mitigating circumstances, which may include "any . . . circumstances appropriate for consideration,"[22] was perhaps facilitated by the defendant's order to his trial attorneys not to present any such evidence.[23] The defendant's contribution to his sentencing hearing featured his assertion that "he would kill again if he had an opportunity, and some of the people he might kill in the future might be members of the jury."[24] While the search for mitigating circumstances was conscientiously performed, in view of the defendant's approach, one might well conclude that the *Judy* case death sentence may have reflected not so much the righteous vindication of community mores,[25] nor community retribution,[26] but the conceded personality disorder of the defendant[27] and his determination to unilaterally impose his own sentence.[28]

The major determinations made by the supreme court in *Judy* were reconsidered in an adversarial context and reaffirmed in *Brewer v. State*.[29] *Brewer* became the first case upholding the imposition of a death sentence under the current statute on a theory of accessory liability. In this case, the victim was shot and killed in his home by one of two perpetrators in the course of the commission of a robbery. The defendant was determined to be one of the two parti-

---

simply by combining the elements of the two Indiana Code sections under which the defendant was convicted.

The possibility of a defendant being sentenced to death essentially in view of a finding that he "has committed another murder, at any time, regardless of whether he has been convicted of that other murder" would appear to pose rather severe double jeopardy and due process problems. *See generally* State v. McCormick, 397 N.E.2d 276 (Ind. 1979).

[22]IND. CODE § 35-50-2-9(c)(7) (Supp. 1981).

[23]416 N.E.2d at 100.

[24]*Id.*

[25]*See, e.g.*, W. BERNS, FOR CAPITAL PUNISHMENT (1979); E. VAN DEN HAAG, PUNISHING CRIMINALS (1975).

[26]*See* 416 N.E.2d at 113 (DeBruler, J., dissenting). *See also* K. MENNINGER, THE CRIME OF PUNISHMENT (1969).

[27]The two court-appointed psychiatrists characterized the defendant as legally sane at the time of the crime, but as manifesting an "antisocial personality disorder." 416 N.E.2d at 100.

[28]There is, in view of the defendant's rejection of the appeal process, a certain irony in the trial court's finding that "Judy has consistently refused to accept responsibility for his various criminal acts, and has shifted the blame and responsibility to others for acts which were solely his own doing." *Id.* at 110. Whether Judy's courtroom declarations can be characterized as "intelligent" or not, the necessity of the trial court's relying upon them at crucial junctures is regrettable. *Id.* at 100, 109-10 ("Judy ordered his attorneys *not* to present any evidence of mitigating circumstances . . . . ") ("Judy personally advised the jury that no . . . mitigating factors were available for their consideration.").

[29]417 N.E.2d 889 (Ind. 1981).

cipants in the robbery. His murder conviction was upheld on appeal on the view that "an offense is committed whenever one intentionally or knowingly aids, induces or causes that offense to be committed"[30] and that "concerted action or participation in a crime"[31] is sufficient in this respect.

Among the issues raised on appeal by the defendant, probably the most significant was whether inflicting the death penalty on an accessory, as opposed to a principal,[32] contravened the constitutional proscription of cruel and unusual punishment in light of *Lockett v. Ohio*.[33] The court found that *Lockett* required not that death sentences in felony murder cases be restricted to the actual "triggerman," but that the death penalty be imposed only in light of a consideration of relevant mitigating factors such as the defendant's age and relative culpability.[34] Although the Ohio death penalty statute struck down in *Lockett* was vulnerable in this respect, the current Indiana statute was determined in *Brewer* to meet the *Lockett* requirement.[35] The court then concluded, crucially, that Indiana has historically imposed the death sentence on accessories to intentional and felony murders, that accessories are guilty of the same crime as their principal, and that imposition of the death sentence under the circumstances of this case was within the contemplation of the legislature.[36] The court focused on the availability to defendants as a mitigating consideration, which may or may not be outweighed by the aggravating circumstances in a given case,[37] that "the defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor."[38]

Thus, the majority was able to approve the trial court's finding of the requisite aggravating circumstances—intentional killing by the defendant while committing or attempting to commit robbery[39]—in the absence of a specific trial court determination that the defendant intentionally, as opposed to knowingly, killed anyone.[40] Whether the sentencing judge determined independently

---

[30]*Id.* at 893.

[31]*Id.*

[32]Brewer's co-defendant and accomplice drew a sentence of sixty years imprisonment at a separate sentencing conducted by a different judge. *Id.* at 909.

[33]438 U.S. 586 (1978).

[34]417 N.E.2d at 903-04.

[35]*Id.* at 904 (citing IND. CODE § 35-50-2-9 (Supp. 1981)).

[36]*Id.*

[37]Thus it is apparently possible in Indiana for one's participation in a crime to be "relatively minor" and yet merit the death penalty.

[38]417 N.E.2d at 904 (citing IND CODE § 35-50-2-9(c)(4) (Supp. 1981)).

[39]*See* IND. CODE § 35-50-2-9(b)(1) (Supp. 1981).

[40]417 N.E.2d at 910-11 (DeBruler, J., dissenting).

of any jury finding that the defendant had intentionally killed the victim was somewhat clouded by his statement of his perceived "duty" to follow a "lawful and proper" sentence recommendation of the jury.[41] Justice DeBruler argued plausibly in dissent that "in light of the irrevocable nature of the penalty involved, the Legislature should make its purpose clear, if it be that persons having no actual conscious purpose of producing death are to be executed."[42]

B. Plea Bargain Agreements and "Shock Probation"

In *State ex rel. Goldsmith v. Marion County Superior Court*,[43] the Indiana Supreme Court held a trial court judge in contempt when the judge used Indiana's modification and review statute[44] to "circumvent" the court's order to either accept a tendered plea agreement or set the case for trial. The supreme court issued the mandate when the trial judge accepted a plea agreement for executed sentences in two criminal cases and then reduced each defendant's sentence. Pursuant to Indiana Code section 35-5-6-2,[45] the supreme court issued its writ of mandamus which the judge complied with by resentencing the defendants according to their plea agreements. When the judge granted the defendants' motions for shock probation several months later, the supreme court found him guilty of contempt.

Indiana's modification and review, or "shock probation," statute grants a court broad discretion to reduce or suspend a sentence

---

[41]*Id.* at 910. Actually, IND. CODE § 35-50-2-9(e)(2) (Supp. 1981) indicates in relevant part that "[t]he court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation."

[42]417 N.E.2d at 912. The supreme court in *Brewer* disposed of two additional interesting issues on appeal. The court held that the state's noncompliance with Indiana Code section 35-50-2-9(a) requiring that the aggravating circumstances charged be listed on a separate page of the charging instrument did not prejudice the substantial rights of the defendant since no premature revelation to the jury of the defendant's prior criminal record could have accrued and it was impossible to segregate robbery from murder evidence against the defendant. 417 N.E.2d at 905-06.

Finally, the court held that the trial court's answering the jury's inquiry during its sentencing deliberations as to the defendant's potential eligibility for parole was not error, even though arguments and instructions tempting the jury to consider the probable time likely to be actually served are generally disfavored. *Id.* at 908. The defendant's guilt had been determined. "Given the task of the jury at this stage of the hearing, it is altogether proper that they be fully aware of the consequences of a prison sentence as well as of the consequences of a death sentence." *Id.* at 909.

[43]419 N.E.2d 109 (Ind. 1981).

[44]IND. CODE § 35-4.1-4-18 (Supp. 1981).

[45]"If the court accepts a recommendation, it shall be bound by its terms." IND. CODE § 35-5-6-2(b) (1976).

within one hundred eighty days after its imposition.[46] The policy generally embodied in such statutes is that the trial court should have the discretion to grant probation after the defendant has been "shocked" into becoming a law-abiding citizen by a short period of incarceration.[47] It is argued further that local trial courts are more familiar with defendants and their promise of rehabilitation than are corrections personnel.[48] The *Goldsmith* court avoided any discussion of the merits of shock probation and determined that "a plea bargain calling for an executed sentence forecloses any probation by the court, including shock probation."[49]

The court based its decision upon the importance of adherence to an explicit agreement between the prosecutor and the defendant. Arguing that such adherence is necessary to "facilitate expeditious disposition of criminal cases,"[50] the court stated that a plea bargaining agreement may be modified by shock probation only if no term of sentence is specified in the agreement or if the parties specifically provide for shock probation.[51]

Ironically, the supreme court's ruling may slow the judicial process by forcing judges to set more cases for trial if defendants believe that agreements under *Goldsmith* will be less favorable than they formerly were. In addition, judges may be less likely to accept tendered agreements in order to preserve their option of granting shock probation.

In dissent, Justice DeBruler forcefully argued that there was nothing in the statute, the plea agreement, or the supreme court's order which withdrew the judge's authority to grant shock probation.[52] Contending that the prosecutor was bound by the terms of his contract, the dissent determined that the judge complied with the agreement and the court's order when he resentenced the defendants following the order.[53] The majority obviously viewed the judge's actions differently: "These courts are not blind to subterfuge and manipulation intended to circumvent their orders. The light penalties imposed in recent cases should not be taken as precedent

---

[46]The only statutory limitation imposed is that a judge may not suspend a sentence for a felony unless suspension is permitted under Indiana Code section 35-50-2-2. IND. CODE § 35-4.1-4-18 (Supp. 1981).

[47]Vito & Allen, *Shock Probation in Ohio: Use of Base Expectancy Rates as an Evaluation Method*, 7 CRIM. JUST. & BEHAVIOR 331, 331-32 (1980).

[48]Ammer, *Shock Probation in Ohio—A New Concept in Corrections after Seven Years in the Courts*, 3 CAP. U. L. REV. 33, 36 (1974).

[49]419 N.E.2d at 114.

[50]*Id.*

[51]*Id.*

[52]*Id.* at 115 (DeBruler, J., dissenting).

[53]*Id.*

for the future."[54] The judge's actions were deemed sufficient to support not only a contempt citation but a restrictive interpretation of the shock probation statute as well.

C. "Allen *Charges*"

Two court of appeals cases decided during the survey period[55] addressed the propriety of supplemental charges given to a deadlocked jury. In *Lewis v. State*,[56] a jury requested further instructions after several hours of deliberation on the defendant's burglary charge. The trial judge delivered a so-called "*Allen* Charge"[57] which stressed the importance of reaching a decision,[58] and twenty minutes later the jury found the defendant guilty. The fourth district of the court of appeals determined that the use of the instruction constitutes reversible error in that it "compels the jury to reach a verdict when it might otherwise not do so and thus denies the parties a fair trial."[59] As an alternative, the court adopted a procedure mandated by a United States Court of Appeals case[60] which provides for a neutral supplemental charge that may be repeated only if it was given before the jury retired.

In *Burnett v. State*,[61] the first district of the court of appeals examined a virtually identical[62] supplemental charge in a trial for battery. The court noted no substantial difference in the content of the charge recommended by the fourth district when it was compared with the instruction under examination. In addition, the court questioned the reasoning behind the requirement that the charge must be given before the jury retires if it is to be given as a supplemental instruction.[63]

---

[54]*Id.* at 114.

[55]Burnett v. State, 419 N.E.2d 172 (Ind. Ct. App. 1981); Lewis v. State, 409 N.E.2d 1276 (Ind. Ct. App. 1980), *vacated and remanded*, 424 N.E.2d 107 (Ind. 1981).

[56]409 N.E.2d 1276 (Ind. Ct. App. 1980).

[57]The charge is named after the case which first considered its propriety. Allen v. United States, 164 U.S. 492 (1896).

[58]An earlier case, Guffey v. State, 386 N.E.2d 692 (Ind. Ct. App. 1979) criticized the following language in particular: "There is no reason to believe that the case can be tried again any better or more exhaustively than it has been. There is no reason to believe that more evidence or clearer evidence would be produced on behalf of either side." Lewis v. State, 409 N.E.2d at 1276. The *Guffey* court upheld the use of such language but stated that such an instruction "approaches commenting on the evidence and the conduct of the trial and we do not recommend its use." 386 N.E.2d at 698.

[59]409 N.E.2d at 1277.

[60]United States v. Silvern, 484 F.2d 879 (7th Cir. 1973).

[61]419 N.E.2d 172 (Ind. Ct. App. 1981), *vacated*, No. 1081 S 307 (Ind. Oct. 27, 1981).

[62]The instruction did not contain the second sentence of a paragraph criticized in an earlier case. *See* note 58 *supra*.

[63]419 N.E.2d at 173.

In a recent decision,[64] the Indiana Supreme Court granted transfer on the *Lewis* case and agreed with the lower court's reversal and remand for a new trial.[65] However, the supreme court clarified the procedure questioned in the *Burnett* opinion: the more neutral charge adopted by the *Lewis* court should be included in all pre-deliberation instructions and if the jury becomes deadlocked, the judge must "reread *all* instructions given to them prior to their deliberations, without emphasis on any of them and without further comment."[66]

D. The Insanity Defense and Psychiatric Testimony

In *McCall v. State*,[67] the state claimed that the defendant was properly barred from presenting expert testimony on his insanity because he refused to cooperate with court-appointed psychiatrists. Although the Indiana Code[68] requires the appointment of two psychiatrists for examination of a defendant who raises the insanity defense, the court determined that this widely-recommended[69] sanction for failure to cooperate would "cut out the heart of a legally acceptable defense."[70]

The court emphasized that the defendant's alleged insanity could have been the cause of his failure to cooperate with examining psychiatrists. Noting that this was a question of fact, the court determined that evidence of a defendant's refusal of examination should be submitted to the jury for consideration on the insanity issue.[71]

The dissent argued vehemently in favor of penalizing the defendant for his lack of cooperation, noting that the defendant specifically violated the legislature's provisions for presenting the issue

---

[64]Lewis v. State, 424 N.E.2d 107 (Ind. 1981).

[65]*Id.* at 112.

[66]*Id.* at 111 (emphasis added).

[67]408 N.E.2d 1218 (Ind. 1980).

[68]IND. CODE § 35-5-2-2 (Supp. 1981).

[69]*See, e.g.*, Karstetter v. Cardwell, 526 F.2d 1144 (9th Cir. 1975); Pope v. United States, 372 F.2d 710 (8th Cir. 1967), *vacated and remanded on other grounds*, 392 U.S. 651 (1968); State v. Whitlow, 45 N.J. 3, 210 A.2d 763 (1965); Lee v. County Court, 27 N.Y.2d 432, 318 N.Y.S.2d 705, 267 N.E.2d 452, *cert. denied*, 404 U.S. 823 (1971); State v. Myers, 220 S.C. 309, 67 S.E.2d 506 (1951).

[70]408 N.E.2d at 1220. In emphasizing the importance of the insanity defense, *id.* at 1220-21, the court came dangerously close to a claim that sanity is an element of criminal intent which the prosecution is required to prove. This argument was recently rejected in a case involving an attack on the constitutionality of placing the burden of proof on the defendant as to the insanity defense. Price v. State, 412 N.E.2d 783 (Ind. 1980).

[71]408 N.E.2d at 1221.

of insanity to a jury.[72] "The majority opinion allows a defendant to call on the plea of insanity, refuse to cooperate with the court-appointed expert witnesses, and then 'have his cake and eat it too,' by calling his witnesses, who will testify that he was insane when he committed the crime."[73]

The majority may have been persuaded by the fact that the court-appointed psychiatrists had previously examined the defendant and were able to testify as to his sanity based on the prior examinations.[74] Nevertheless, the opinion does not indicate that the decision is limited to the facts before the court. The result appears to be that a defendant may avail himself of the insanity defense, present expert testimony as to his insanity, and thwart the prosecution's ability to rebut that testimony by refusing to cooperate with court-appointed psychiatrists.

E. Lesser Included Offenses and Double Jeopardy

Two recent decisions from the Indiana Court of Appeals[75] differed in their interpretation of Indiana's statutory definition of "included offenses."[76] The newly enacted statute, section 35-41-1-2, provides that an included offense is an offense that:

> (1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged;
> (2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or
> (3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission.[77]

The dispute as to the meaning of the statute arose in the context of a defendant's conviction for an offense other than the crime for which he was charged.[78]

---

[72]*Id.* at 1224 (Pivarnik, J., dissenting).

[73]*Id.*

[74]*Id.* at 1219. Another factor which influenced the court's decision was its determination that the defendant's witness was not an expert for purposes of the proposed sanction. *See* Karlson, *Evidence, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 227, 242 (1981).

[75]Murphy v. State, 414 N.E.2d 322 (Ind. Ct. App. 1980); Lewis v. State, 413 N.E.2d 1049 (Ind. Ct. App. 1980).

[76]IND. CODE § 35-41-1-2 (1976 & Supp. 1981).

[77]*Id.*

[78]The issue is one of notice to the defendant. Due process requires that a defendant receive sufficient notice of the crime for which he is charged so that he can ad-

In *Lewis v. State*,[79] the trial court granted the defendant's motion for a directed verdict in regard to a charge of forgery but found the defendant guilty of attempted theft. The defendant appealed, arguing that the crime of attempted theft was not an included offense of the charged crime of forgery. The court agreed with the defendant's argument and reversed the conviction.[80]

The court applied the "two-pronged test" of *McGairk v. State*[81] in defining what constitutes an included offense under Indiana Code section 35-41-1-2. In *McGairk*, the first district court of appeals determined that an included offense is defined by two of the three factors set out in the statute:

> First, there must be a determination of the material elements involved. These can be either the same elements or less than those required for the offense charged. The second determination is whether the lesser offense consists of an attempt to commit the offense charged *or* whether the lesser offense differs from that charged only in respect to some less serious harm or risk of harm, or whether a lesser culpability is required for the commission of the lesser offense.[82]

The fourth district *Lewis* court held that neither part of the *McGairk* test was satisfied when the offense of attempted theft was compared with the forgery charge.[83] The court noted that the crime of theft requires proof of two additional elements not present in the definition of forgery[84] and that attempted theft does not involve less harm, risk of harm, or culpability than does forgery. Therefore, the information was insufficient to give adequate notice of the crime for which the defendant was convicted.[85]

In *Murphy v. State*,[86] the second district of the court of appeals refused to apply the *McGairk* test. Judge Sullivan noted that the *McGairk* language was dicta and wrote, "We disagree with that in-

---

equately prepare his defense. IND. CONST. art. 1, § 13; Blackburn v. State, 260 Ind. 5, 291 N.E.2d 686 (1973). If the charging instrument or indictment provides the defendant with adequate notice of the charged offense it is deemed to have provided notice of lesser included crimes as well. McGairk v. State, 399 N.E.2d 408 (Ind. Ct. App. 1980).

[79]413 N.E.2d 1069 (Ind. Ct. App. 1980).

[80]*Id.* at 1072.

[81]399 N.E.2d 408 (Ind. Ct. App. 1980).

[82]*Id.* at 411.

[83]413 N.E.2d at 1071-72.

[84]Theft requires knowing or intentional unauthorized control over another's property and intent to deprive that person of the value or use of his property. Neither requirement is an element of a forgery charge. *Compare* IND. CODE § 35-43-4-2 (Supp. 1981) *with id.* § 35-43-5-2.

[85]413 N.E.2d at 1072.

[86]414 N.E.2d 322 (Ind. Ct. App. 1980).

terpretation and conclude that the statute defines an 'included offense' as any one of the three subdivisions standing alone."[87] The court determined that because an attempt was statutorily defined as an included offense in the second subdivision of the statute, the trial court did not commit per se error in instructing the jury on attempted burglary when the defendant was charged and tried for burglary.[88]

The court in *Lewis* merely adopted the test set out in *McGairk*. Neither court cited authority for the "two-pronged" interpretation. The *Murphy* court based its interpretation of section 35-41-1-2 on standard drafting guidelines, the legislature's use of the disjunctive conjunction "or," and a comparison of other definitions set forth in the statute.[89] The *Murphy* test is further supported by a comment to the annotated version of section 35-41-5-1[90] and appears, at first blush, to be the more reasonable approach.

This split of opinion in the court of appeals produces broader implications than the facts of the *Murphy* and *Lewis* cases suggest.[91] Because the ultimate question is whether the defendant is sufficiently apprised of the charge against him,[92] the propriety of the *Murphy* test is questionable. For example, it is doubtful that a defendant would have notice of an offense which merely satisfies the statute's third requirement of less serious harm, risk of harm, or culpability. Alternatively, by determining that the first subdivision's requirement of matching elements must be met in every case, the *McGairk-Lewis* test assures that the charging instrument or indictment will provide the defendant with notice adequate to prepare his defense.

In *State v. Tharp*,[93] the Indiana Court of Appeals addressed the

---

[87]*Id.* at 324. The court added in a footnote that reference to other subdivisions of the statute is necessary only under the provision of the second subdivision that an included offense consists of an " 'attempt to commit the offense charged *or* [an attempt to commit] an offense *otherwise included* therein.' An offense 'otherwise included' is obviously one which complies with either subsection '1' or '3'." *Id.* n.3 (quoting IND. CODE § 35-41-1-2 (Supp. 1981)) (emphasis and language added by the court).

[88]*Id.* at 324-25. The court further determined that there was sufficient evidence from which the jury could find the defendant guilty of the attempt and that the instruction was therefore proper. *Id.* at 326.

[89]*Id.* at 324-25 (citing THE DRAFTING MANUAL FOR THE INDIANA GENERAL ASSEMBLY 902, 904 (1976)).

[90]"It should also be noted that § 35-41-1-2 of the Penal Code defines attempt as an 'included offense' of the consummated crime." IND. CODE ANN. § 35-41-5-1, Commentary (West 1978).

[91]The *Murphy* case may well have had the same result had the court applied the *McGairk* test. Because an attempt merely requires a substantial step toward commission of the underlying crime (coupled with the culpability required for that crime), the "material elements" prong of the *McGairk* test probably would have been satisfied. *See* IND. CODE § 35-41-5-1 (Supp. 1981).

[92]*See* note 78 *supra*.

[93]406 N.E.2d 1242 (Ind. Ct. App. 1980).

issue of whether the state may prosecute two defendants for conspiracy after prosecution for the underlying offense is barred by the "speedy trial" rule.[94] The state argued that although the defendants were not brought to trial on theft charges within the one year prescribed by the rule,[95] prosecution for conspiracy to commit theft was not barred by double jeopardy principles.

The court rejected the double jeopardy analysis and relied instead on the case of *Pillars v. State*.[96] In *Pillars*, the court of appeals held that a speedy trial dismissal of assault with intent to kill barred the later charges of threatening to use a deadly weapon and aiming a weapon.[97] The *Tharp* court cited *Pillars* for the proposition that

> the State may not, subsequent to a criminal charge becoming time-barred . . . subject the defendant to a related charge, although not strictly an included offense, growing out of the same transaction, incident, events, or set of facts, which facts or events had occurred and were known or, in the exercise of due diligence, should have been known to the State, and which related charge could have been joined with the initial charge . . . .[98]

The court noted that the conspiracy charge could have been joined with the charge of theft[99] and therefore held that the conspiracy charge was time-barred as well.[100]

The court's reasoning is unconvincing. After noting that the case before it did not present a double jeopardy problem, the court cited an Ohio double jeopardy opinion in support of its decision and stated that "[w]e are convinced that these observations of the Supreme Court of Ohio are as applicable to the situation before us as they were to the double jeopardy problem addressed by that court."[101] In so doing, the court ignored the test for double jeopardy set out by the Indiana Supreme Court in *Elmore v. State*.[102] The test employed in *Elmore*, whether each offense "requires proof of an additional fact

---

[94]"No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge . . . is filed, or from the date of his arrest . . . , whichever is later . . . ." IND. R. CRIM. P. 4(C).

[95]*Id.*

[96]390 N.E.2d 679 (Ind. Ct. App. 1979).

[97]*Id.* at 684.

[98]406 N.E.2d at 1246.

[99]*Id.* n.6.

[100]*Id.* at 1246.

[101]*Id.*

[102]382 N.E.2d 893 (Ind. 1978).

which the other does not,"[103] resulted in that court's decision that the offenses of theft and conspiracy to commit theft are not the same for purposes of double jeopardy.[104]

The court in *Tharp* relied upon *Pillars* because *Pillars* presented a similar speedy trial problem. However, the *Tharp* language is broader than *Pillars* would dictate. Although the *Pillars* decision has been criticized for ignoring the double jeopardy test and for focusing on the fact that all the offenses arose from the same facts,[105] the *Pillars* court did note that the lesser crimes of aiming and threatening to use a weapon were necessary elements of the time-barred charge.[106] The *Pillars* analysis thus focused on both the elements of the offenses involved and on the fact that the same harm arose from the same act. Nowhere in that opinion is the "message clear"[107] that any crime which could have been statutorily joined with the discharged offense is similarly barred.

F. Collateral Estoppel and the Habitual Offender Law

In *Hall v. State*,[108] the Indiana Supreme Court held that a criminal defendant could not use the doctrine of collateral estoppel to prevent the prosecution's introduction of two prior convictions to establish habitual offender status.[109] The habitual offender charge against the defendant was based in part upon earlier convictions for burglary and escape.[110] An earlier court had also considered a habitual offender charge against the defendant in connection with a rape conviction and had dismissed the charge because the state failed to establish that the defendant had made knowing and voluntary guilty

---

[103]*Id.* at 895 (quoting Blockburger v. United States, 284 U.S. 299 (1932)).

[104]*Id.* at 898. The relationship between double jeopardy principles and the issue before the *Tharp* court is not as tenuous as the court suggests. Although it is true that a speedy trial discharge does not constitute an acquittal, it has been held that such a discharge is a bar to further prosecution of the charge in much the same way an acquittal operates to bar further prosecution in a double jeopardy setting. *See* Small v. State, 259 Ind. 349, 287 N.E.2d 334 (1972); State *ex rel.* Hasch v. Johnson Circuit Court, 234 Ind. 429, 127 N.E.2d 600 (1955). It was this reasoning which supported a decision that the time-barred discharge of an offense is effective to bar all lesser included offenses as well. 259 Ind. at 352-53, 287 N.E.2d at 336.

[105]*See* Raphael & Steinberg, *Criminal Law and Procedure, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 257, 270 (1981).

[106]390 N.E.2d at 684.

[107]*See* State v. Tharp, 406 N.E.2d at 1246.

[108]405 N.E.2d 530 (Ind. 1980).

[109]An individual may be sentenced as an habitual offender for any felony if he has accumulated two prior unrelated felony convictions. IND. CODE § 35-50-2-8 (Supp. 1981).

[110]Only one of these two convictions was actually necessary for the habitual offender charge because the defendant had secured a third conviction after those convictions but before the charges brought in this case. 405 N.E.2d at 536.

pleas to the burglary and escape charges. The defendant argued that this was a final determination of the validity of the two prior convictions.

The *Hall* court concluded that the trial court judge was correct in allowing the state to allege and present proof on the two felony convictions, even though the previous court had dismissed the earlier habitual offender count on the basis of invalidity, and stated:

> The action of the trial court at the previous habitual offender trial did not operate to "acquit" the defendant of the two prior felony convictions. Its action involved only the sentencing to be imposed upon the 1977 rape charge and a determination of defendant's status as an habitual offender based upon the evidence presented at the time.[111]

The court reasoned that the habitual offender charge was "based upon the *fact* of [the] two prior felony convictions"[112] and that although the defendant could have raised the convictions' asserted invalidity as a defense, he could not rely on the principles of collateral estoppel.

Problems with the case arise in connection with the finality rule; one of the necessary purposes of a trial is to establish the position between the litigants for all time. Here, an unappealed or unsuccessfully appealed decision of one court was re-opened by another court, with the result that the two tribunals reached inconsistent decisions. The question also arises whether the earlier court's ruling was in fact a determination of invalidity. The *Hall* court reasoned that the previous court was merely considering the sentencing to be imposed. That was, however, the precise issue before the court in the latter case.

The policy consideration involved in issue preclusion is harassment of the defendant by the prosecution. The *Hall* court decided that two of the convictions used to prove habitual offender status could be relitigated on the issue of validity. It allowed the state to bring in more evidence to prove validity, even though it had been unsuccessful in an earlier trial on the same point.

G. Standards of Care: Neglect of a Dependent and Criminal Recklessness

In *Smith v. State*,[113] the Indiana Court of Appeals reviewed the defendant's conviction for neglect of a dependent.[114] On February 19,

---

[111] *Id.* at 536-37.

[112] *Id.* at 536.

[113] 408 N.E.2d 614 (Ind. Ct. App. 1980).

[114] IND. CODE § 35-46-1-4 (Supp. 1981).

1978, the defendant witnessed a brutal beating of her son which resulted in the four-year-old's death. The defendant did nothing to protect her son from the attacker, the defendant's boyfriend, and sought no medical treatment for him until several hours later. She was tried and convicted under Indiana Code section 35-46-1-4 which provides that "a person having the care, custody, or control of a dependent who knowingly or intentionally . . . places the dependent in a situation that may endanger his life or health . . . commits neglect of a dependent . . . ."[115] The conviction was attacked with the argument that the state failed to prove the requisite criminal intent and any acts proximately resulting in the young boy's death.

The court of appeals was unpersuaded. Citing to cases[116] decided prior to the enactment of the present statute, the court reasoned that a parent has an affirmative duty to care for his or her child. Therefore, the state need only prove that a "defendant parent was aware of facts that would alert a reasonable parent under the circumstances to take affirmative action to protect the child."[117] The court found that proof of actual knowledge or active participation on the defendant's part was not required under this "reasonable parent" standard.[118]

The court refused to apply the statutory definitions[119] of the words "knowingly" and "intentionally" which essentially provide for a subjective test of culpability. Setting forth an objective "reasonableness" test, Judge Neal wrote, "The words 'knowingly' or 'intentionally,' as contained in Ind. Code 35-46-1-4, can scarcely have their usual application in a situation, as here, . . . where the offense grows out of the nonperformance of an affirmative duty imposed by [case] law for the care and protection of a child."[120]

In *Williams v. State*,[121] the Indiana Court of Appeals held that driving while intoxicated and striking a bicyclist was sufficient to support a conviction of criminal recklessness under the 1977 Crim-

---

[115]*Id.* The defendant's sentencing on this conviction was ultimately vacated because she was also convicted and sentenced for involuntary manslaughter under IND. CODE § 35-42-1-4 (Supp. 1981). Sentencing on both the involuntary manslaughter conviction and the necessarily included neglect charge was a violation of double jeopardy principles. 408 N.E.2d at 622.

[116]Eaglen v. State, 249 Ind. 144, 231 N.E.2d 147 (1967); Hunter v. State, 172 Ind. App. 397, 360 N.E.2d 588 (1977).

[117]408 N.E.2d at 621.

[118]*Id.* at 621-22.

[119]"Intentional" conduct requires a conscious objective, and "knowing" conduct requires that a person be aware of a high probability that he is engaged in such conduct. IND. CODE § 35-41-2-2(a), (b) (Supp. 1981).

[120]408 N.E.2d at 621.

[121]415 N.E.2d 118 (Ind. Ct. App. 1981).

inal Code.[122] The majority determined that because of changes made in the Criminal Code, prior case law[123] requiring proof of additional reckless conduct beyond proof of intoxication was no longer applicable. The court concluded that the defendant's intoxication constituted recklessness because it " 'involve[d] a substantial deviation from acceptable standards of conduct.' "[124]

The dissent sharply criticized the holding that intoxication is sufficient to constitute recklessness.[125] Commenting that the majority "seize[d] upon a distinction without substance,"[126] Judge Young argued that the new crime of criminal recklessness involves the same standard as did reckless homicide under the old code.[127] Therefore, the cases which established the proof necessry to show recklessness "serve as perfect guideposts for review of a conviction for recklessness."[128] This contention is supported by the Indiana Criminal Law Study Commission Comments which state that the reckless state of mind has been recognized in Indiana as an element in such crimes as reckless homicide and reckless driving.[129] The Commission further states that Indiana Code section 35-41-2-2(c), which defines the word "recklessly," does not alter the test for recklessness used by Indiana courts.[130]

---

[122]Criminal recklessness is a new offense under the 1977 Code. IND. CODE § 35-42-2-2(b) (Supp. 1981). Recklessness is defined at *id.* § 35-41-2-2(c).

[123]DeVaney v. State, 259 Ind. 483, 496, 288 N.E.2d 732, 738 (1972); Broderick v. State, 249 Ind. 476, 231 N.E.2d 526 (1967); Johnson v. State, 164 Ind. App. 12, 19-20, 326 N.E.2d 637, 642-43 (1975). These cases involved interpretation of Indiana's reckless homicide statute. The new criminal recklessness statute is designed to encompass *"all the offenses committed by the reckless handling of motor vehicles except reckless homicide."* Williams v. State, 415 N.E.2d at 123 (quoting IND. CODE ANN. § 35-42-2-2, Indiana Criminal Law Study Commission Comments (West 1978)) (emphasis added by the court).

[124]415 N.E.2d at 123 (quoting IND. CODE § 35-41-2-2(c) (Supp. 1981)).

[125]415 N.E.2d at 123 (Young, P.J., dissenting).

[126]*Id.* at 124.

[127]*Id.* Judge Young recognized that the offenses essentially differ only in the degree of harm that must be proved.

[128]*Id.*

[129]IND. CODE ANN. § 35-41-2-2, Indiana Criminal Law Study Commission Comments (West 1978).

[130]*Id.*

VII. Decedents' Estates and Trusts

DEBRA A. FALENDER*

In a decision that may appeal particularly to will drafters as opposed to their clients, the Indiana Supreme Court during the survey period determined that the statute of limitations applicable in an action by a disappointed will beneficiary against the drafting lawyer for malpractice in drafting a will is a two-year statute that begins to run at the date of the decedent's death. This decision, and two court of appeals decisions, one dealing with the doctrine of equitable election and the other resolving a variety of estate administration issues, are discussed in the first three sections of this Survey. Other significant developments in the decedents' estates area are reviewed in the following subsections of the fourth section: will contests, contracts affecting the distribution of decedents' estates, other issues affecting the distribution of decedents' estates, appointment and removal of the personal representative, the purchase of estate property by the personal representative, the dead man's statute, the common-law presumption of death, and statutory amendments affecting decedents' estates. The fifth and final section of this Survey includes significant trust cases involving: lapse and conditions of survival, breach of trust and removal of the trustee, and constructive trusts. There were no modifications of the trust code enacted during the survey period.

The decision of the court of appeals in *Criss v. Bitzegaio*,[1] reversing a summary judgment entered in favor of the plaintiff, Bitzegaio, was vacated when the supreme court granted the plaintiff's petition to transfer and affirmed the summary judgment.[2] Although the supreme court's decision was rendered after the survey period, a discussion of it is included here to complete the review of the case contained in last year's Survey.[3] Summary judgment was rendered in favor of Bitzegaio on the theory that a purchase money resulting trust arose in his favor as a consequence of an oral agreement whereby Bitzegaio and two other men (Criss and Swango) were each to contribute one-third of the purchase price for equal interests in a parcel of real estate they planned to purchase. Only Criss and Swango actually paid the purchase money to the seller of the prop-

---

*Associate Professor of Law, Indiana University School of Law—Indianapolis; A.B., Mount Holyoke College, 1970; J.D., Indiana University School of Law, 1975.

[1]402 N.E.2d 1279 (Ind. Ct. App. 1980), *vacated*, 420 N.E.2d 1221 (Ind. 1981).

[2]Criss v. Bitzegaio, 420 N.E.2d 1221 (Ind. 1981).

[3]Falender, *1980 Survey of Recent Developments in Indiana Law, Decedents' Estates and Trusts*, 14 IND. L. REV. 291, 308 (1980).

erty on the day of sale, and the deed to the property was made out only to them. Criss died without having executed a deed conveying any interest to Bitzegaio, and thereafter Bitzegaio brought an action to enforce a purchase money resulting trust as to an undivided one-third interest in the real estate.[4]

In Indiana, when a conveyance is made to one person, but the consideration for the conveyance is paid by another, a so-called purchase money resulting trust arises in favor of the one who paid the purchase money if "by agreement, and without any fraudulent intent, the party to whom the conveyance was made . . . was to hold the land or some interest therein in trust for the party paying the purchase-money or some part thereof."[5] The agreement of the grantee to hold an interest for the party paying the purchase money must be made before the grantee acquires title to the property and must be supported by valuable consideration.[6]

The trial court in the Criss case found that Bitzegaio's pleadings, affidavit, and exhibits established all the elements necessary for the existence of a purchase money resulting trust: an agreement, free from fraud, entered into before Criss and Swango acquired title, and supported by the consideration of Bitzegaio's promise to pay one-third of the purchase money.[7] In rendering summary judgment in favor of Bitzegaio, the trial court also found that the defendants had not raised a genuine issue of material fact regarding the existence of any of these elements.[8] The supreme court agreed that no factual issue had been raised and affirmed the trial court's judgment, although the court of appeals had reversed and had directed that summary judgment be entered in favor of the defendants.

The consideration that Bitzegaio alleged in support of the resulting trust was his oral promise to pay one-third of the purchase money. The majority of the court of appeals had decided that, because of the Statute of Frauds would have prevented enforcement of the oral promise, Bitzegaio had not established sufficient consideration to support a resulting trust in his favor.[9] The majority of the supreme court, however, held that the summary judgment in favor of Bitzegaio should stand because the defendants had presented "no evidence . . . to challenge the existence" of an enforce-

---

[4]The defendants in the action were Swango and the heirs and personal representative of Criss.

[5]IND. CODE § 30-1-9-8 (1976).

[6]420 N.E.2d at 1224 (citing Auten v. Sevier, 136 Ind. App. 434, 202 N.E.2d 274 (1964)).

[7]420 N.E.2d at 1224. Thus, as a matter of law, the plaintiff was entitled to the relief granted.

[8]*Id.* at 1224.

[9]402 N.E.2d at 1281, *vacated*, 420 N.E.2d 1221 (Ind. 1981).

able agreement among the three men.[10] Neither the defendants, nor the court of appeals, could properly raise on appeal an issue of fact that had not been raised at the summary judgment hearing.

A. *Malpractice Statute of Limitations*

In *Shideler v. Dwyer*,[11] the five justices of the Indiana Supreme Court agreed that the statute of limitations applicable in a malpractice action brought against the drafting lawyer by a disappointed will beneficiary is the two-year statute applicable in actions "[f]or injuries to personal property."[12] The justices did not agree, however, on the issue of when the cause of action accrued and the statute of limitations began to run.

The decedent died on December 14, 1973, and his will was admitted to probate on December 21, 1973. The will contained a clause directing a shareholder of a coproration, in which the decedent was also a shareholder, to " 'cause the Corporation to pay [the plaintiff] as a retirement benefit the sum of $500 per month.' "[13] The plaintiff retired October 31, 1974, and after she did not receive payment of the benefit in November, she asked the probate court to construe the decedent's will.[14] Although the plaintiff argued that the clause

---

[10]420 N.E.2d at 1223. The defendants had raised the Statute of Frauds defense in their answer to the plaintiff's complaint. Bitzegaio, however, had filed an affidavit and other materials establishing the lack of an issue of fact regarding the existence of an agreement. The court stated that the defendants could "not rest upon [their] pleadings but must come forth with specific facts showing that there is a genuine issue for trial." 420 N.E.2d at 1223. The defendants had filed a counter-affidavit reciting "some historical information," but the counter-affidavit included nothing "to challenge the existence of the agreement among the three men prior to the purchase of the property." *Id.*

[11]417 N.E.2d 281 (Ind. 1981) (superseding 386 N.E.2d 1211 (Ind. Ct. App. 1979)). The *Shideler* case is reviewed in Comment, Shideler v. Dwyer: *The Beginning of Protective Malpractice Actions in Indiana*, 14 IND. L. REV. 927 (1981). A careful reading of this Comment is recommended. This Survey discussion is intended only to call attention to the decision and to highlight the particular ramifications of the decision upon lawyers involved in estate planning and probate.

[12]The quoted language appears in the first clause of IND. CODE § 34-1-2-2 (1976). Because the only issue before the court was that of the statute of limitations, the court expressly declined to render an opinion on the right of the disappointed beneficiary to maintain a malpractice action against the drafting lawyer. Many states, however, recognize a cause of action in the disappointed beneficiary. *See* Annot., 45 A.L.R.3d 1181, 1195 (1972).

[13]417 N.E.2d at 284.

[14]Prior to her retirement, the plaintiff was advised that the drafting lawyer, who was then serving as the attorney for the decedent's estate, was of the opinion that the plaintiff would not be entitled to the retirement benefit described in the will unless she met the qualifications of the corporation's profit-sharing plan. The plaintiff did not meet these qualifications, but she retired nonetheless, and then sought to have the pro-

was enforceable, the probate court, on June 30, 1975, held the clause void and ineffective as precatory.[15] On June 29, 1977, the plaintiff filed the malpractice action against the drafting lawyer, alleging that the decedent had intended for the plaintiff to receive $500 per month as a retirement benefit and that the lawyer should have known that the clause would not effectuate that intent. The plaintiff contended that the cause of action against the lawyer did not accrue, and the statute of limitations did not commence to run, until June 30, 1975, the date when the probate court decreed that the clause was void. Two justices agreed with the plaintiff, but the majority held that the cause of action accrued, and the statute began to run, the day the decedent died, in the case of a plaintiff with no reasonable grounds for questioning the validity of the clause.[16]

The two dissenting justices pointed out the fallacies and unfairness inherent in the majority's reasoning and conclusions regarding the time when the statute commenced to run[17] and succinctly exposed the impossibility of the plaintiff's position under the majority's rule:

> Upon probate of the will, [the beneficiary] presumes he is to benefit under the will, thus he bides his time waiting for the proper authority to fulfill the bequest. Some time later, he learns that the administrator of the estate has no intention of fulfilling the bequest. He still takes the position the bequest is valid and institutes proceedings in the Probate

---

bate court mandate payment to her. A declaratory judgment would have been a safer course of action.

[15]The probate court decreed the clause void and precatory because the shareholder could not cause the corporation to pay the retirement benefit to the plaintiff. 417 N.E.2d at 284. This decree was not appealed.

[16]The majority, holding that the statute of limitations commences to run when damage has occurred, concluded that damage occurred to the plaintiff on the date the decedent died, at which time his will containing the questionable bequest became operative. The court explained the distinction between *damage*, in the sense of the irremediable injury that must occur to commence the running of the statute, and *damages* as a measure of compensation, which need not be known or ascertained when the statute commences to run. *Id.* at 289. Quoting from Schmidt v. Merchants Dispatch Transp. Co., 270 N.Y. 287, 300, 200 N.E. 824, 827 (1936), the court stated:

> "The injury occurs when there is a wrongful invasion of personal or property rights and then the cause of action accrues. Except in cases of fraud where the statute expressly provides otherwise, the statutory period of limitations begins to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury. Consequential damages may flow later from an injury too slight to be noticed at the time it is inflicted. No new cause of action accrues when such consequential damages arise."

417 N.E.2d at 289.

[17]417 N.E.2d at 295.

> Court for enforcement of the bequest. At this time his bridge is still standing, and he is taking the position that it is sturdy enough to support him in his position. He, of course, would take the position that the attorney who drafted the instrument drafted a perfectly valid instrument. It would be unthinkable for him at that time to bring an action against the attorneys for drafting a bad instrument. His bridge does not collapse until the Probate Court makes a decision that the bequest in the will is unenforceable, and that he will take nothing under the terms of the will. Only then is he in a position to turn his attention to the drafters of the instrument which has failed him.[18]

The dissent thus describes what a reasonable beneficiary would think and do in the course of asserting the validity of a will or will clause in his favor. The majority, however, would likely force the beneficiary to be unreasonable and to do the unthinkable, namely, to assert the validity of the will or will clause in an action in the probate court at the same time he is asserting the invalidity of the clause in an action against the drafter. Perhaps the *Shideler* decision will render reasonable the advice that a will beneficiary should sue the drafting lawyer the day before the expiration of two years after death in every undistributed estate.

B. Equitable Election

The equitable principle that one who seeks equity must do equity is the basis of the doctrine of equitable election, which was explained and applied in *Citizens National Bank v. Stasell.*[19] Application of the doctrine requires the one who asserts a claim to property under the terms of a will must acknowledge the full operation of that will and must recognize the equitable rights of others created by that will.[20]

In the *Stasell* case, Eva Martin and her husband, Charles, owned a sixty-acre tract of real estate as tenants by the entireties. Eva, who died in 1952, devised this tract to her husband for life, remainder to her nieces and nephews. Eva also devised the residue of her estate to her husband, and the husband accepted substantial benefits pursuant to this residuary clause. After the husband died in 1975, his second spouse and the personal representative of his estate sued to quiet title to the sixty-acre tract. The trial court, applying the doctrine of equitable election, held that title should be quieted in

---

[18] *Id.*

[19] 408 N.E.2d 587 (Ind. Ct. App. 1980).

[20] *See generally* T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 138 (2d ed. 1953).

Eva's nieces and nephews. The court of appeals affirmed. All the requirements for application of the doctrine were present: Eva intentionally disposed of the sixty-acre tract; Eva had no testamentary power over the tract since at her death her surviving spouse Charles (the surviving tenant by the entireties) owned the entire fee; Eva's will put Charles on notice of the fact that her disposition of the sixty-acre tract was contrary to his rights as the sole owner in fee simple; Charles was a beneficiary under the residuary clause of Eva's will; and Charles accepted benefits under the residuary clause. Thus, Charles was bound to acknowledge the full operation of Eva's will, including the passing of the remainder interest in the sixty-acre tract to Eva's nieces and nephews.

In the *Stasell* case, both parties believed that a crucial issue was of ownership of the sixty-acre tract at the time of execution of Eva's will. The court of appeals, however, after noting that a will is ambulatory and inoperative until the testator's death, stated that ownership at the time of execution is irrelevant to the question of whether the doctrine of equitable election applies. The relevant issue is the intent of the testator to specifically dispose of the property of another by the will, and the crucial time for determining whether the property is property of another is the date of the testator's death. In *Stasell*, the former entireties property was owned solely by Eva's husband at the moment of Eva's death.

The message of *Stasell* to will beneficiaries is obvious: A beneficiary should carefully read all will provisions before happily accepting a devise or bequest. The message to drafters is equally clear: The drafter should carefully inquire about the ownership of all specifically devised or bequeathed property to be certain either that the testator owns the property, or if not, that the testator intends for an election to occur. Furthermore, because of the language in the *Stasell* opinion indicating that ownership at the time of execution of the will is irrelevant, the draftsman should warn the testator of potential frustration of intent whenever the testator sells or gives specifically devised property to another will beneficiary after executing the will.

C. The Kingseed *Saga: Estate Administration Issues*

Albert Kingseed died in July, 1969 leaving a will in which he devised his 160-acre farm and the two houses on it to the children of his deceased son Robert, $10,000 to his daughter Geneva Wolff, $5,000 to his granddaughter Marilyn Foland, and the residue of his estate in three equal shares, one to Robert's four children, one to Geneva Wolff, and one to Marilyn Foland. The will was admitted to probate shortly after Kingseed's death, and Joseph Noel was appointed executor of Kingseed's estate.

The controversies in *In re Estate of Kingseed*[21] grew out of the final account filed by Noel following his resignation as executor in September 1976. In his final account, Noel reported the distribution of the 160-acre farm and its income to Robert's children in February 1970, relying on the fact that he had then advised Robert's children that they could thereafter make their own arrangements for use and rental of the farm property, which they did.[22] Noel did not, however, obtain a court order authorizing distribution of the farm,, and Geneva Wolff, a general and residuary devisee, objected to the reported "distribution." Noel also reported the payment of $11,850 of attorney and executor fees to himself, again without court approval, and Wolff challenged the reasonableness of the fees.[23]

A special judge was appointed to consider all matters related to Noel's discharge.[24] Several of the judge's determinations were the subject of appeal and cross-appeal. The following discussion will consider only the most significant issues resolved on appeal. Because of its complexity, the *Kingseed* case is one that should be read in its entirety.

1. Attorney and Executor Fees.—The judge determined that Noel should repay to the estate $5,820 plus prejudgment interest[25] because reasonable attorney and executor fees would have been only $6,030, not the $11,850 which Noel had paid to himself. Noel contended on appeal that the reduction in requested fees was an abuse of discretion and contrary to the law and the evidence. Noting the settled Indiana rule that the determination of fees is within the sound discretion of the trial court,[26] the court of appeals found

---

[21]413 N.E.2d 917 (Ind. Ct. App. 1981).

[22]The farm land was rented under a share-cropping arrangement in 1969, and the landlord's share of the rent for that year was paid into the estate. After being advised by Noel in February 1970 to make their own arrangements for the farm operation, Robert's children, through their mother and guardian Mildred Kingseed, rented the farm under a cash-rent arrangement and retained the rent for 1970 and all years thereafter. Furthermore, in 1972 and thereafter, Mildred rented the second house on the farm and retained the rent for the children.

[23]Wolff also claimed that Noel had mismanaged a parcel of Kingseed's real estate in Amboy, Indiana. The trial judge did not require Noel to account for this alleged mismanagement, and the court of appeals found no error in the court's failure to require Noel to account. The evidence of mismanagement was not so clear as to lead only to the conclusion that Noel was responsible. 413 N.E.2d at 920, 934.

[24]The regular judge disqualified himself on his own motion and submitted the issues involving Noel's final account to the special judge. *Id.* at 919.

[25]The special judge determined that the rate of pre-judgment interest was 6%. The court of appeals held that the judge should have applied the statutory rate of interest, 8%, to Noel's repayment of fees and also to repayments ordered to be made to the estate by Kingseed's children. *Id.* at 934-35.

[26]The court cited, *inter alia*, *In re* Estate of Newman, 369 N.E.2d 427 (Ind. Ct. App. 1977) for the proposition that attorney and executor fee allowances are left to the

substantial support for the reduction, especially "Noel's participation and acquiescence in the unreasonable and unexplained delays in settling the estate."[27] The message of the *Kingseed* case to executors and attorneys representing the estate was clearly stated: "When sanctions in the form of a reduction of fees become necessary to safeguard and enforce this central policy [to settle estates as expeditiously as possible], we are fully prepared to support them."[28] Although the court discussed other factors which supported the fee reduction, the court emphasized that delay alone would have been a sufficient reason to reduce Noel's requested fees.[29]

2. Authority of the Special Judge.—The special judge determined that the general bequests to Wolff and Foland should have been distributed on March 1, 1971,[30] and ordered distribution with interest from March 1, 1971. Noel and Robert's children appealed this determination, and the court of appeals held that this portion of the order exceeded the jurisdiction conferred upon the special judge. The special judge had been appointed only for the purpose of hearing Noel's final account and objections to it, and the regular judge retained jurisdiction over all estate matters not submitted to the special judge.[31] The Kingseed estate remained open after Noel's discharge; a successor personal representative had been appointed and was responsible for the continued administration and distribution. All matters of administration and distribution apart from the matter of Noel's discharge remained within the jurisdiction of the regular judge.[32]

3. Retroactive Approval of an Unauthorized Partial Distribution.—The special judge retroactively approved Noel's partial distribution of the farm property to Robert's children, but determined that the distribution should have been made on March 1, 1971, instead of February 1970.[33] Consequently, pursuant to Indiana Code

---

discretion of the trial court and will be reversed on appeal only on a showing of abuse of discretion. 413 N.E.2d at 932.

[27]413 N.E.2d at 932. Noel represented the estate for nearly seven years. For a period of more than four years, between April of 1970 and August of 1974, "Noel failed to take any court action in any matter concerning the estate . . . ." *Id.* at 931 (emphasized in original). In August of 1974, the trial court on its own motion ordered a hearing regarding a trial of claims continued in April of 1970. *Id.* at 931-32.

[28]*Id.* at 932. The court of appeals, citing Indiana Code section 29-1-16-2, referred to "the clear policy of our Probate Code to settle estates as speedily as possible for the protection and in the interest of creditors and heirs alike." *Id.*

[29]*Id.*

[30]*Id.* at 928.

[31]*See* Zaring v. Zaring, 219 Ind. 514, 39 N.E.2d 734 (1942), *quoted in* 413 N.E.2d at 929.

[32]413 N.E.2d at 929.

[33]*Id.* at 928. See *id.* at 924 n.8 for a discussion of how the court arrived at the date of March 1, 1971.

section 29-1-17-7,[34] the judge ordered Robert's children to repay to the estate the income they received from rental of the farm land in 1970, along with prejudgment interest.[35] Robert's children appealed the portion of the order requiring repayment. Wolff contended that Noel or Robert's children should also have been required to account to the estate for the fair rental value of the houses on the farm property from the date of Kingseed's death to the court-approved distribution date of March 1, 1971. The appellate court's determinations regarding these issues are the most significant determinations in the *Kingseed* case. Another message, this time to will draftsmen, comes through loud and clear.

The court of appeals affirmed the trial judge's retroactive approval of the partial distribution of the farm to Robert's children. First, the court held that because Noel reported the distribution of the farm in his final account, the special judge had jurisdiction to approve or disapprove the distribution as part of his mandate to consider all matters related to Noel's final account and discharge.[36] Secondly, the court of appeals held that retroactive approval of a distribution was within the judge's authority.[37] An unauthorized payment or distribution, made in good faith, may be subsequently approved "if another's rights are not affected . . . and the result is that which the law would have accomplished . . . ."[38] In the *Kingseed*

---

[34]IND. CODE § 29-1-17-7 (1976) provides:

> Unless the decedent's will provides otherwise, all income received by the personal representative during the administration of the estate shall constitute an asset of the estate the same as any other asset and the personal representative shall disburse, distribute, account for and administer said income as a part of the corpus of the estate.

[35]*See* note 25 *supra* regarding the proper rate of interest.

[36]In fact, if the special judge had not expressly considered the propriety of the distribution, an order discharging Noel would have worked as an implied approval of the reported distribution. *See In re* Estate of Saltzman, 145 Ind. App. 488, 251 N.E.2d 595 (1969) (the trial court's approval of an executor's current report was in effect a ratification of a prior unapproved disposition of property not included in that account). The special judge, therefore, necessarily had to resolve the issue of the unauthorized distribution in order to resolve the issues directly related to the approval of Noel's final account and discharge.

[37]Wolff and Foland argued, in essence, that the unauthorized distribution was void and could not be retroactively validated. In support of their position that a court is without authority to render a retroactive approval, they cited Indiana Code section 29-1-13-1, which mandates the personal representative to take possession of the decedent's property and collect rents, and section 29-1-17-1, which provides the procedures for effectuating a partial distribution and thereby terminating the personal representative's statutory duties with respect to the distributed property. Wolff and Foland argued that they were prejudiced by the retroactive approval since they were thereby deprived of income that would have been distributable, in part, to them (as residuary devisees) pursuant to Indiana Code section 29-1-17-7. 413 N.E.2d at 922.

[38]413 N.E.2d at 923.

case, the unauthorized partial distribution of the farm property to Robert's children was made in good faith to the proper distributees,[39] and the rights of the complaining residuary devisees to income from the property during administration of the estate was not sufficient to warrant disapproval of the distribution.[40]

Finally, the court of appeals reasoned that if the trial court had the authority to render retroactive approval of an unauthorized distribution, it also had the authority to retroactively disapprove a part of the distribution.[41] Thus, the court upheld the judge's authority to approve the distribution as of March 1, 1971, instead of the reported date of February 1970. Because this order in effect disapproved the children's receipt of income prior to March 1, 1971, the court of appeals held that the trial judge necessarily had to require the children to return to the estate the income they had collected prior to the court-approved date of distribution.[42]

---

[39]There was no showing of lack of good faith, and the children were the ones entitled to the farm.

[40]The court of appeals said:

> [O]ur Probate Code does not sanction extensive delay by residuary legatees to increase their share of the estate. "If the closing of the estate is long delayed as by the determination of the estate tax, justice would indicate a partial distribution to enable the distributee to obtain the yield from the property which might otherwise, under IC 29-1-17-7, go to the residuary legatee under the will." J. Grimes, 2A Henry's Probate Law & Practice, ch. 25, § 2 at 51 (7th ed. 1979).

413 N.E.2d at 923-24.

[41]413 N.E.2d at 926.

[42]*Id.* The children were ordered to return all money collected from rental of the farm land in 1970.

This part of the *Kingseed* decision, affirming the order requiring return of the 1970 farm income to the estate, was based in part on the trial court's specific statutory authority to require the return of any property distributed by court order if the return is ordered before the decree of final distribution, and if the return "is for the best interest of the estate." IND. CODE § 29-1-17-1(a) (1976). The phrase "best interest of the estate" has been held to mean "when necessary for the payment of debts, legacies or claims." Smith v. Smith, 76 Ind. 236, 239 (1881), *overruled on other grounds*, Cupp v. Ayers, 89 Ind. 60, 63 (1883). In the *Kingseed* case, there was no showing that the income for the year 1970 was needed to pay debts, legacies, or claims. The use of section 29-1-17-1(a) as support for the order of return was therefore either misplaced, or an indication that "best interest of the estate" may include interests other than the payment of debts, legacies, or claims.

While the authority of the special judge may have extended to approval in part and disapproval in part of the unauthorized partial distribution, the judge's authority need not have extended to an order of return of the income to the estate because the issue of the propriety of that distribution was necessarily raised by Noel's final account. The children were not only devisees of the farm property, but also were residuary devisees who would share with Wolff and Foland any income earned during administration of the estate. The issue of the return of one year's income, when the cash was not required to pay debts, legacies, or claims, is an issue that might have

The court of appeals also remanded the case for a determination of whether Noel should account for his failure to collect rent for both farm houses prior to the authorized distribution date.[43] The court held that an executor "may be held accountable for failure to lease the property and collect the rents if it would have been in the best interest of the estate for him to do so."[44] The *Kingseed* holding, imposing upon the executor a duty of management and productivity akin to the duty imposed upon a trustee,[45] is the first explicit holding to that effect in an Indiana case. The imposition of a duty to manage and make estate assets productive is well-placed: It would be unreasonable, imprudent, and wasteful for an executor to let estate assets remain idle for a year or more of administration. Yet, the executor is placed in a delicate position. The primary duty of the executor, after collection of assets and payment of debts and taxes, is to distribute estate assets in kind as speedily as possible to the intended beneficiaries.[46] Therefore, when administration commences, the executor must evaluate the administrative complications that may delay partial and final distribution of estate assets to determine whether and on what terms to lease or otherwise invest estate

---

been left to be resolved on final distribution by the regular judge. Administrative savings to the estate resulting from the children's management of the farm property may well have occurred, and these savings should have been taken into account before the entire amount of income received was ordered returned to the estate.

Another possibility, not ostensibly considered by the *Kingseed* court, is that the executor should be the one liable to the residuary legatees for loss to them due to his premature unauthorized distribution. Certainly the children, in collecting the income, acted more in good faith than Noel acted when he turned the management over to them. Who should ultimately be responsible for the executor's neglect of duty in failing to obtain proper court authority for the distribution of the farm to the children? The children relied on the executor's advice that they could begin to collect the farm income in 1970. Wolff and Foland might properly recoup their losses from Noel, rather than from the children.

[43]Robert's children had occupied the larger farmhouse during this period, and the smaller house remained vacant.

[44]413 N.E.2d at 928 (citing 33 C.J.S. *Executors and Administrators* § 259(c)(1) (1942) and IND. CODE §§ 29-1-16-1(c), -15-3 (1976)). The court noted that this is the law in jurisdictions where the personal representative is charged with possession of the real estate during administration of the estate, as he is under Indiana Code section 29-1-13-1. *Contra, e.g.*, Riling v. Cain, 199 Kan. 259, 428 P.2d 789 (1967); *In re* Estate of Reiman, 272 Wis. 378, 75 N.W.2d 564 (1956) (where executor is not charged with possession of real property).

[45]*See, e.g.*, IND. CODE § 30-4-3-6 (1976), expressing the trustee's duty to manage and invest trust assets as a reasonable man would do, with a view to the productivity as well as the safety of the trust corpus. Although the *Kingseed* holding is limited to the decision that an executor has a duty to lease real property if the leasing is in the best interest of the estate, it is probably correct to assume that the courts will impose upon executors a general duty to make personal property in an estate productive if that would be in the best interest of the estate.

[46]IND. CODE § 29-1-17-2 (1976).

assets. To protect himself from later claims of mismanagement, the executor should keep a record of the factors that influenced his decision to invest or not.

The *Kingseed* court gives some guidance as to the factors to be evaluated by the executor in deciding whether to lease or otherwise invest estate property. When the court remanded the case for a determination of Noel's liability to be surcharged for the rental value of the smaller house on the farm property, and for a determination of the liability of Robert's children for their use and occupancy of the larger house, the court cautioned that "the interests of all potential beneficiaries of the estate warrant consideration."[47] The court stated that "it may well have been a proper exercise of discretion for Noel to permit Mildred and the Kingseed children to occupy the larger house in return for maintenance and upkeep."[48] Thus, although the executor may consider the interests and well-being of intended estate beneficiaries, the court intimates that the executor's discretion must be exercised with a view to the pecuniary soundness of the investment decision. The executor, it seems, cannot, without authority in the will, decide not to lease or otherwise invest estate property, or decide to allow the intended beneficiaries to enjoy possession of the property, without some quid pro quo benefitting the estate.

Here lies a message to drafters. If it is contemplated that devisees may desire to occupy real estate specifically devised to them, the drafters should propose a will provision authorizing the devisees to occupy rent-free during the period of administration.[49] The drafter might also consider a provision expressly authorizing the devisee to manage the property and collect the income during administration. Such provisions, of course, would not be operative to defeat the rights of creditors of the estate, but the abatement status of the rental income or fair rental value could be clarified in the will.[50] Furthermore, the liability of the specific devisee who is authorized to occupy or manage the property for mortgage payments, taxes, insurance, and maintenance should be established in the will.

---

[47]413 N.E.2d at 928.

[48]*Id.*

[49]" 'It certainly is but a simple matter for a testator to avoid the application of [Indiana Code section 29-1-17-7] if he so wishes, by the addition of the appropriate language to the will.' " 413 N.E.2d at 925 (quoting *In re* Estate of Darby, 154 Ind. App. 238, 241, 289 N.E.2d 542, 544 (1972)).

[50]A specific devise abates last, unless otherwise provided in the will. IND. CODE § 29-1-17-3 (1976). The will should clarify whether or not the rent-free occupancy is to have the same abatement status as the specific devise itself.

D. Other Decedents' Estates Developments

1. *Will Contests.*—Indiana Code section 29-1-7-17 provides that "*[a]ny interested person* may contest the validity of any will . . . ; and the executor and *all other persons beneficially interested therein* shall be made defendants" in the will contest action.[51] In *Cook v. Loftus*,[52] the court discussed and distinguished the interest required to establish the contestant's standing to contest a will, and the interest that renders a person a necessary party-defendant in a will contest action. The court in *Cook* held, in a decision of first impression on the issue, that heirs-at-law are not necessary parties-defendant to a will contest. The phrase describing necessary parties, "persons beneficially interested therein," refers to persons beneficially interested in the will being contested, and heirs-at-law are not interested in the will being contested "unless they take some beneficial interest under the will."[53]

2. *Contracts Affecting Distribution of Estates.*—In *Estate of Gillilan v. Estate of Gillilan*,[54] Charles and Mae had entered into an antenuptial agreement which provided that if Charles predeceased Mae, Mae would receive " 'the entire net income from his estate for and during the term of her natural life,' " in full satisfaction of all dower and homestead rights and all other claims that Mae might assert as his widow or heir.[55] Charles and Mae were subsequently

---

[51]IND. CODE § 29-1-7-17 (1976).

[52]414 N.E.2d 581 (Ind. Ct. App. 1981).

[53]*Id.* at 587, quoting from 2A HENRY'S PROBATE LAW AND PRACTICE 781 (7th ed. J. Grimes 1979) as follows:

> "I.C. 29-1-7-17 would appear to differentiate between those who may contest a will and those who are necessary parties to a will contest. As seen heretofore all heirs may contest unlesss disinherited under a previous will. But only those 'beneficially interested therein' need be made parties. This would seem to indicate that only the executor, the legatees, and the devisees are necessary parties. Other heirs are not unless they take some beneficial interest under the will."

The *Cook* court also reiterated the requirements for establishing an interest to contest a will when that interest arises under a prior will. The devisee under a prior will is an interested party, with standing to contest under section 29-1-7-17, if that devisee establishes facts which would authorize the probate of the prior will under which he or she claims. 414 N.E.2d at 585. It is not sufficient that the devisee under the prior will merely prove that an instrument exists purporting to be a prior will of the testator.

Because the issue was not raised, the court did not determine whether devisees under a prior will are necessary parties to the will contest action. Applying the logic of the decision, it seems that for the purpose of a will contest action, the devisees under a prior will are in the same position as the heirs, and are not necessary parties to the will contest action.

[54]406 N.E.2d 981 (Ind. Ct. App. 1980).

[55]*Id.* at 983. The agreement also provided that Charles would provide a home for and support Mae during their marriage and that if Mae survived Charles, Charles would not make any claims to any part of Mae's estate.

married, and Charles predeceased Mae,[56] leaving a will which made substantial provision for Mae, but which did not literally comply with the antenuptial agreement.[57] Mae filed a timely election to take against the will, asserting that Charles's execution of the non-complying will could be treated as an offer to rescind the antenuptial agreement.[58] The executor of Charles's estate contended that the antenuptial agreement was enforceable and not rescinded. The trial court rendered summary judgment ordering that the agreement be enforced by its terms, and the court of appeals affirmed this judgement.

Early in the opinion, the *Gillilan* court suggested that an antenuptial contract cannot be rescinded, absent mutual agreement, after the marriage of the parties, because the parties cannot be restored to the status quo once the contract is partially performed by consummation of the marriage.[59] Later in the opinion, however, the court recited the traditional contract law principle that a material breach of a contract may justify rescission at the instance of the non-breaching party.[60] In other words, the non-breaching party to an antenuptial contract may consider his obligation to perform terminated upon material breach of contract by the other party. A material breach was described as a breach that substantially defeats the purpose of the contract, or a breach whereby the breaching party puts it " 'beyond his power to carry out his contract.' "[61]

Under the *Gillilan* facts, the court of appeals determined that the provisions of Charles's will substantially accomplished the purpose of the antenuptial agreement and his minor breach was easily remedied by allowing Mae the entire net income pursuant to the contract. Because Charles substantially performed his part of the contract, Mae could not consider her obligation under the contract

---

[56]Charles died on May 28, 1975, and Mae died on October 27, 1975.

[57]In his will, Charles created several trusts. A substantial part of the income from these trusts was payable to Mae during her life. It is not clear whether Mae was given the equivalent of the entire net income from the estate. The court of appeals noted that "Mae's Estate presents no evidence to show that she would have been better off under the antenuptial agreement." 406 N.E.2d at 991.

[58]Mae sought to establish rescission of the contract in order to be free to assert her statutory elective share of one-third of Charles's net real and personal estate. *See* IND. CODE § 29-1-3-1 (1976). (Mae was a second spouse, but it appears that Charles left no surviving descendents. Thus, Mae's elective share of the real estate was not limited to a life estate in one-third of that real estate. *See id.*) Mae sought to be free from performance of her promise to accept the benefits described in the antenuptial agreement in lieu of her elective share.

[59]406 N.E.2d at 987.

[60]*Id.* at 990.

[61]*Id.* at 989 (quoting Mallow v. Eastes, 179 Ind. 267, 273, 100 N.E. 836, 838 (1913)).

excused, and she was bound to perform her agreement to take the income in lieu of all other interest in Charles' estate.

If Charles had left Mae nothing in his will, however, it is likely that the court still would have found the contract enforceable. Charles had agreed to give his wife all the net income from his estate. The fact that Charles failed to leave a will giving his wife all the net income does not mean that he put it " 'beyond his power to carry out his contract.' "[62] Even if there is no actual "performance" of the contract by the breaching spouse, if it is possible to mandate performance, the other spouse will not be permitted to overthrow the entire contract and "work a fraud upon the marriage" consummated in partial performance of the agreement.[63] Thus, whenever the only performance required of the surviving spouse is the acceptance of limited benefits from the estate of the deceased spouse, if those benefits can be provided from the estate of the deceased spouse, the surviving spouse will not be excused from performance of his or her agreement to accept only the limited benefits.

Two cases were decided during the survey period involving contracts allegedly arising out of joint, as opposed to mutual but separate, wills.[64] In each case, the joint will gave rise to an argument that the will was executed pursuant to a contract not to revoke it.[65] In each case, the trial court had determined that the evidence was not sufficient to establish clearly and unequivocally the existence of such a contract, and, in each case, the court of appeals affirmed the trial court's judgment.

These two cases illustrate why no sensible drafter should ever consider the execution of a joint will. As is apparent from the fact that in both cases the only evidence offered of the existence of a contract not to revoke was the will itself, unless the existence of a contract is specifically and carefully negated in the will, a contractual argument is nearly always plausible when a joint will has been used. Furthermore, at the time of death of the first to die, when the joint will is first probated, those who are to become beneficiaries upon the death of the survivor are made aware of the provisions in their favor in the survivor's will. The survivor's will is not private,

---

[62]406 N.E.2d at 989.

[63]406 N.E.2d at 991 (quoting Cantor v. Cantor, 174 N.E.2d 304, 315 (Ohio P. Ct. 1959)).

[64]Moore v. Harvey, 406 N.E.2d 354 (Ind. Ct. App. 1980); Wisler v. McCormack, 406 N.E.2d 361 (Ind. Ct. App. 1980).

[65]In each case, the attempted revocation occurred after the death of the first to die and after the acceptance by the survivor of benefits conferred by the joint will. While the revocation in *Wisler* was occasioned by the surviving spouse's execution of a subsequent will, the revocation in *Moore* occurred because of the surviving spouse's inter vivos transfer of the subject matter of a devise.

and if the survivor revokes it, the beneficiaries, who know that their hopes have been dashed, will be tempted to litigate the contractual issue. Reciprocal and identical provisions may be accomplished in separate, mutual wills, and the privacy of each testator's will may be better assured. In any event, each separate, mutual will should contain a specific provision indicating whether or not the will is revocable or executed pursuant to a contract not to revoke.

3. Distribution of Estates.—In *Key v. Sneed*,[66] the testator bequeathed one-half of his personal property and a life estate in one-third of his real estate to his wife, and the rest and residue of his estate to a trustee to pay the income from the trust property to the testator's daughter.[67] In the decree of final distribution, the income earned by the estate during administration was to be distributed to the trustee. The testator's wife contended that she should receive a share of that income, and the court of appeals agreed. The bequest to the wife was "expressed in terms of [a] fractional interest in the entire estate,"[68] namely, one-half of the testator's personal property and, therefore, was a bequest of that fractional share of the property available for distribution.[69] The court of appeals referred to and

---

[66]408 N.E.2d 1305 (Ind. Ct. App. 1980).

[67]*Id.* The dispositive clause describing the wife's share read as follows: " 'It is my will and I do hereby give and bequeath to my beloved wife . . . one-half (½) of my personal property and a life estate in one-third (⅓) of my real estate.' " *Id.* at 1305-06. The devise of the residue to the trust was in the article following the devise to the wife and read in part as follows: " 'It is my will and I do hereby give, devise and bequeath all the rest and residue of my estate, both real and personal, unto the [trustee] . . . in trust.' " *Id.* at 1306.

[68]*Id.* at 1307.

[69]*Id.* at 1308. The court stated:

> The proper analysis involves the method by which the amount of the bequest is determined. If a bequest is for a sum certain, even if a general bequest, the legatee gets that amount, and no more. Likewise, if the bequest is specific, such as an identifiable object, property, or fund, the legatee gets that object, property, or fund, and no more. On the other hand, where the bequest is expressed in terms of a fractional interest in the entire estate, as we have here, and the amount of the bequest can be ascertained only by reference to all of the assets of the estate and all of the liabilities, then all of the estate assets must be considered. The question then is whether income is a distributable asset in this context.

Id. at 1307. The court then decided that: "Inasmuch as Ind. Code 29-1-17-7 assigns to income earned during administration the role of an asset of the estate and orders it distributed as a part of the corpus of the estate, it necessarily follows that [the wife] should receive her portion of the income." *Id.* at 1308. (Section 29-1-17-7 is reprinted in full at note 34 *supra*.) Thus, the wife was entitled to one-half of the personal property available for distribution and the trust was entitled to the other half of the personal property available for distribution. The court distinguished *In re* Estate of Darby, 154 Ind. App. 238, 289 N.E.2d 542 (1972) (bequest of a sum certain) and *In re* Estate of Brown, 145 Ind. App. 591, 252 N.E.2d 142 (1969), *overruled on other grounds*, Pepka v.

relied upon a previous appellate decision regarding this same estate, in which case the court had decided that the wife's fractional share of the estate was required to bear a "proportionate share of the debts and expenses" of the estate.[70]

In *Diaz v. Duncan*,[71] the court of appeals affirmed the applicability of the anti-lapse statute to a lapsed residuary devise where the deceased devisee was a descendant of the decedent and left surviving descendants.[72] An interesting aspect of the opinion is the court's commitment, in dicta, to adhere to decisions under the former law[73] that held that the other residuary devisees take the deceased residuary devisee's lapsed share when the anti-lapse provisions do not operate to save the lapsed share for descendants of the deceased devisee.[74] Thus, even though Indiana Code section 29-1-6-1(g) is capable of the construction that a lapsed residuary devise passes by intestacy and does not pass to other residuary devisees,[75] the well-established former law, passing lapsed residuary devises to the other residuary devisees, may be adhered to in the future.[76]

Another issue addressed by the court involved the effect of the failure of an interested party to file specific written objections to the administrator's final account and proposed distribution prior to the date of the hearing on the account and distribution. The trial court had continued the hearing to allow the objectors to file their

---

Branch, 155 Ind. App. 637, 294 N.E.2d 141 (1973) (specific bequest of an identifiable fund).

[70]408 N.E.2d at 1307. Judge Buchanan had rendered a decision in a prior appeal involving the estate, American Fletcher Nat'l Bank & Trust Co. v. American Fletcher Nat'l Bank & Trust Co., 161 Ind. App. 166, 314 N.E.2d 810 (1974), in which the court held that the wife's "interest was a fractional bequest, in that it was expressed in terms of a fractional share of the entire estate, and that under the law . . . her interest was required to bear its proportinate share of the debts and expenses." 408 N.E.2d at 1307. The *Key* court considered itself bound by Judge Buchanan's prior ruling that the wife's one-half interest "should be computed on the basis of the net estate available for distribution." *Id.*

[71]406 N.E.2d 991 (Ind. Ct. App. 1980).

[72]*See* IND. CODE § 29-1-6-1(g)(2) (1976).

[73]406 N.E.2d at 998-99.

[74]*E.g.*, West v. West, 89 Ind. 529 (1883); Carey v. White, 126 Ind. App. 418, 126 N.E.2d 255 (1955).

[75]The language supporting this construction is the following language in IND. CODE § 29-1-6-1(g)(1) (1976) (emphasis added): "If a devise of real or personal property, *not included in the residuary clause of the will*, is void, is revoked, or lapses, it shall become a part of the residue, and shall pass to the residuary devisee."

[76]Of course, if the residuary devise is to a class, and one of the class members predeceases the testator, the remaining surviving class members share the residuary devise unless the anti-lapse statute saves the lapsed devise for descendents of the deceased devisee. *Compare* Robbins v. Springer, 119 Ind. App. 560, 88 N.E.2d 573 (1979) *with* T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 140 at 782-83 (2d ed. 1953).

specific objections in writing.[77] The administrator contended that the continuance was improper because the probate judge had no "jurisdiction to distribute the proceeds of an estate in a manner other than suggested by the administrator if, on the date set for hearing on said proposed distribution, no specific objections have been filed."[78] The court of appeals stated that the trial judge has the right to modify a proposed distribution even if no objections are filed.[79] The court concluded that, under Indiana Code section 29-1-1-7, the trial judge, in ordering the continuance, formulated "an appropriate rule of procedure for the particular case before him."[80]

4. Appointment and Removal of Personal Representatives.—In two cases decided during the survey period, the court of appeals reviewed probate court judgments rendered on matters of appointment and removal of personal representatives.[81] In each case, the court of appeals emphasized the considerable discretion of the probate court in such matters.[82] In reviewing for an abuse of discretion, each court examined the reasons given to justify the manner in which the trial court exercised its discretion.[83] In one case, *In re Estate of Sandefur*,[84] the court of appeals found an abuse of discretion, but in the other case, *In re Estate of Baird*,[85] the court found no abuse.

In *Sandefur*, the trial court abused its discretion when it ordered removal of an executrix on a finding that the executrix " 'refuses to carry out the provisions of the last will and testament

---

[77]406 N.E.2d at 1001. The situation in the case was unusual in that the objectors had filed objections earlier in the proceeding, but the trial judge had ruled that the objections were filed prematurely. At the hearing on the final account, the objectors orally moved to reinstate the prior objections. The trial court denied the motion because the objections were not sufficiently specific, but continued the hearing to allow the objectors time to file more specific written objections.

[78]*Id.* The administrator cited Indiana Code sections 29-1-1-10 and 29-1-16-7 in support of his position.

[79]406 N.E.2d at 1001. Pursuant to Indiana Code section 29-1-17-2(b), the court has the final responsibility to determine how an estate should be distributed.

[80]406 N.E.2d at 1003. A procedure that "aid[s] the judge in distribution of the estate pursuant to the law and according to the wishes of the testator" is "not unlawful but, rather, commendable." *Id.* at 1002, 1003.

[81]Recent cases dealing with the removal of trustees are reviewed in the text accompanying notes 158-68 *infra*.

[82]*See, e.g.*, Hauck v. Second Nat'l Bank of Richmond, 153 Ind. App. 245, 286 N.E.2d 852 (1972); Helm v. Odle, 129 Ind. App. 478, 157 N.E.2d 584 (1959).

[83]The standard of review for an abuse of discretion "requires that a reason stated by the trial court justify the manner in which it exercised its discretion." *In re* Estate of Baird, 408 N.E.2d 1323, 1328 (Ind. Ct. App. 1980) (citing City of Elkhart v. Middleton, 265 Ind. 514, 356 N.E.2d 207 (1976)).

[84]413 N.E.2d 309 (Ind. Ct. App. 1980).

[85]408 N.E.2d 1323 (Ind. Ct. App. 1980).

of the decedent.' "[86] On the same day that he executed his will, the decedent executed a deed conveying a parcel of real estate to himself and his mother as joint tenants with right of survivorship. In his will, the decedent stated that it was his intent not to dispose of this real estate through the will unless at the time of his death his mother had predeceased him, leaving him as the surviving joint tenant. Although the decedent in fact predeceased his mother, the executrix of the decedent's estate filed an action against the mother to recover the real estate, alleging that the joint tenancy was created as security for a loan to the decedent. The mother responded to this action by filing a petition requesting the removal of the executrix on the grounds that the executrix had refused to carry out the provision of the will in which the decedent expressed his intent not to include the real estate in his estate if his mother survived him. The court of appeals concluded that the executrix's actions could not "be classified as an attack upon the will itself or a refusal to carry out the terms of the will."[87] The court noted that the executrix had obtained prior court approval before bringing the action to recover the real estate and further noted that the executrix had a duty to seek to recover the real estate "if she in good faith believed the real estate was properly an asset of the estate," in spite of language to the contrary in the will.[88] Clearly, then, the probate court abused its discretion in ordering the removal of the executrix.

The executrix initially had moved to dismiss the removal petition on the grounds that the mother was not an "interested person" within the meaning of the removal statute.[89] The probate court did not dismiss the mother's petition, but instead ordered the executrix to appear and show cause why she should not be removed. Although the mother was not an "interested person" within the meaning of the removal statute,[90] the probate court did not commit error in failing to dismiss the petition on the ground of the mother's lack of interest, because the removal statute authorizes the court on its own motion to order the personal representative "to appear and show cause why he should not be removed."[91]

---

[86]413 N.E.2d at 310.

[87]*Id.* at 311.

[88]*Id.*

[89]IND. CODE § 29-1-10-6(a) (1976).

[90]413 N.E.2d at 310. Because the decedent gave nothing to his mother in his will, the mother did not have a present interest in the estate sufficient to authorize her to petition for removal of the executor. *See, e.g.*, Fowler v. Ball, 82 Ind. App. 167, 141 N.E. 64 (1923) (an heir at law given nothing in the testator's will does not have a sufficient interest to petition for removal).

[91]IND. CODE § 29-1-10-6(a) (1976).

In *In re Estate of Baird*, the court of appeals affirmed the trial court's conclusion that a nominated co-executor was unsuitable to serve.[92] The trial court had determined that the named co-executor "was a legatee under the will, that he had a prospective claim against the estate, and that antagonism and animosity existed between" the two named co-executors.[93] The court of appeals held that neither the executor's interest as a beneficiary nor his interest as a potential claimant rendered him unsuitable to serve as executor. The court of appeals also held, however, that the hostility existing between the nominated co-executors was sufficient to render the executor unsuitable, since the trial court could have reasonably concluded that this hositility would interfere with the orderly and efficient administration of the estate.[94]

5. *Purchase of Estate Property by the Personal Representative.*—In *Hensley v. Hensley*,[95] the testator's will provided, in the pertinent part, that the testator's son " 'will have first refusal of the farm known as "the home place" at the estate appraisal.' "[96] The son, who was also the executor of the estate, had the property appraised and purchased it for the appraised value without giving notice to the heirs and devisees. The son notified the trial court of the sale and the trial court approved it, but when the residuary devisees challenged the sale on the grounds of lack of notice,[97] the trial court set it aside.

Indiana Code section 29-1-15-2 provides that a personal representative who acts under authority given in the will may proceed to sell property without first obtaining a court order and, consequently, without complying with the provisions of Indiana Code section 29-1-15-11 requiring prior notice to heirs and devisees.[98] The trial court concluded that the son had not acted pursuant to a power

---

[92]408 N.E.2d at 1329. Unsuitability is a ground for finding that a personal representative does not qualify for appointment, IND. CODE § 29-1-10-1(b)(6) (1976), or should be removed, *id.* § 29-1-10-6.

[93]408 N.E.2d at 1328.

[94]*Id.* at 1329. The court, quoting Comstock v. Bowles, 295 Mass. 250, 260, 3 N.E.2d 817, 822-23 (1936), stated that unsuitability is " 'not restricted to instances of absolute unfitness but [includes] an unfitness arising out of the situation of the person in connection with the estate.' " 408 N.E.2d at 1328; *cf.* Massey v. St. Joseph Bank & Trust Co., 411 N.E.2d 751, 758 (Ind. Ct. App. 1980) ("hostility between the trustee and the beneficiaries is not a per se ground for removal of the trustee").

[95]413 N.E.2d 315 (Ind. Ct. App. 1980).

[96]*Id.* at 316.

[97]The devisees also alleged improper valuation, but there was no evidence indicating that the farm was improperly appraised. *Id.* at 318 n.1.

[98]The executor acting under a power granted in the will need not comply with § 29-1-15-3 (court order) or § 29-1-15-11 (notice) of the Indiana Code. IND. CODE § 29-1-15-2 (1976).

granted in the will and, therefore, was not excused from complying with the notice requirements of the probate code. The trial court concluded that a first refusal sale requires a third party bid, which the son had not obtained. The court of appeals, however, found that the language regarding the appraisal was sufficient to allow the son to exercise his "first refusal" without a third party bid.[99] Thus, the court held that the son had specific authority in the will to purchase the estate property at its appraised value and was not required to comply with the notice provisions of the probate code.[100]

The residuary devisees argued that "the sale of estate property by an executor to himself, as an individual, is prohibited under any circumstances by Indiana law."[101] The devisees relied on *In re Estate of Garwood*,[102] in which the Indiana Supreme Court held that a sale of estate property by an executor to himself will be set aside without a showing of fraud or unfairness, and in spite of a showing that the sale was in good faith or was beneficial to the estate.[103] In *Garwood*, however, the supreme court had intimated that the testator may empower an executor to purchase estate property,[104] and the *Hensley* court concluded that the testator's language regarding first refusal at the estate appraisal was clearly the sort of authority that the *Garwood* court had anticipated.[105]

6. The Dead Man's Statute.—In *Summerlot v. Summerlot*,[106] the court of appeals held that the dead man's statute, Indiana Code section 34-1-14-7,[107] does not apply in a suit against a surviving tenant by the entireties to enforce a contract for sale of the entireties

---

[99]413 N.E.2d at 317.

[100]*Id.*

[101]*Id.* at 318.

[102]400 N.E.2d 758 (Ind. 1980), *noted in* Falender, *1980 Survey*, *supra* note 3, at 303-04.

[103]400 N.E.2d at 764.

[104]*Id.* at 767.

[105]413 N.E.2d at 318.

[106]408 N.E.2d 820 (Ind. Ct. App. 1980).

[107]IND. CODE § 34-1-14-7 (1976) provides:

> In all suits by or against heirs or devisees, founded on a contract with or demand against the ancestor, to obtain title to, or possession of property, real or personal, of, or in right of, such ancestor, or to affect the same in any manner, neither party to such suit shall be a competent witness as to any matter which occurred prior to the death of the ancestor.

The court stated that the companion statute, Indiana Code section 34-1-14-6, which applies in all suits in which a personal representative is a party, is plainly intended "to protect the decedent's estate while it is represented by an executor or administrator, but unfortunately affords no protection thereafter if the executor or administrator assigns claims to an heir or legatee." 408 N.E.2d at 826. Indiana Code section 34-1-14-7 was "ostensibly enacted" to protect the estate in the event the executor or administrator had assigned claims to an heir or devisee. 408 N.E.2d at 826.

property allegedly entered into while both entireties owners were alive. The statute does not preclude the admission of testimony regarding conversations between the plaintiff and the deceased entireties owner, because neither the plaintiff nor the surviving entireties tenant is an "heir" within the sense that the term "heir" is used in the statute.[108] Furthermore, the statute is not intended to apply if the estate of a decedent is not affected by the outcome of the lawsuit.[109] A suit seeking to obtain title to or possession of the entireties property will not affect the estate of the decedent cotenant, because entireties property never becomes part of the deceased cotenant's estate.[110]

7. Presumptions of Death.—In *Roberts v. Wabash Life Insurance Co.*,[111] a case involving claims by life insurance beneficiaries for payment of policy proceeds, the court of appeals discussed the common-law presumption of death after a seven-year unexplained, continuous absence.[112] The court held that the presumption is a rebuttable presumption, which is "not evidence of the ultimate fact" of death, and which serves no purpose in the case once the opponent introduces rebuttal evidence.[113] The court also held that Indiana Code section 29-2-7-1,[114] which provides that the presumption of death of Indiana Code section 29-2-5-1[115] after a five-year unexplain-

---

[108]The surviving spouse is, of course, an heir of his or her deceased spouse, but the surviving spouse is not an heir as to the entireties property. Both tenants by the entireties own the whole estate during their lives, and the surviving entireties owner acquires nothing new by virtue of his survivorship. 408 N.E.2d at 825 (quoting Spurgeon v. Olinger, 64 Ind. App. 176, 115 N.E. 680 (1917)). Technically, then, the action to enforce the contract was not an action brought by or against an heir or devisee in respect of the property at issue in the lawsuit.

[109]The court stated:

> [T]he only purpose of the dead man's statutes is to preserve decedents' estates from spurious claims or defenses. If the *estate* of the decedent is not affected, either directly or indirectly, the statute is not intended to apply. It is elementary, of course, that entireties property does not become part of the decedent's estate.

408 N.E.2d at 827 (emphasis in original). *See also, e.g.*, Durham v. Shannon, 116 Ind. 403, 19 N.E. 190 (1888); Sloan v. Sloan, 21 Ind. App. 315, 52 N.E. 413 (1898).

[110]408 N.E.2d at 827.

[111]410 N.E.2d at 1377 (Ind. Ct. App. 1980).

[112]The court described the common-law presumption of death as follows: "When a person is inexplicably absent from home for a continuous period of seven years, fails to communicate with those persons who would be most likely to hear from him, and cannot be found despite diligent inquiry and search, that person is presumed to be dead." *Id.* at 1382 (citing Equitable Life Assurance Society v. James, 73 Ind. App. 186, 127 N.E. 11 (1920); Metropolitan Life Insurance Co. v. Lyons, 50 Ind. App. 534, 98 N.E. 824 (1912)).

[113]410 N.E.2d at 1383 (citing Sumpter v. State, 261 Ind. 471, 306 N.E.2d 95 (1974); Kaiser v. Happel, 219 Ind. 28, 36 N.E.2d 784 (1941)).

[114]IND. CODE § 29-2-7-1 (1976).

[115]*Id.* § 29-2-5-1.

ed, continuous absence relates back to the day of disappearance, "relates only to the settlement of estates of absentees and has no application independently in determining rights under insurance contracts."[116]

8. Statutory Developments.—The 1981 legislature has afforded a new method of establishing a custodianship for a minor.[117] The Indiana Uniform Gift to Minors Act[118] was amended by adding a new section,[119] allowing a testator or settlor to devise or transfer property to a person designated in the will or trust as custodian for a minor[120] and allowing a personal representative or trustee to distribute, with court approval, a minor's property to a custodian if "the court finds that the distribution is in the best interest of the minor . . . [and] the applicable will, if any, or trust instrument authorizes such a transfer."[121] The section describes the persons who may serve as custodian,[122] the type of property that may be distributed to a custodian,[123] and the effect of such a devise or transfer to a custodian.[124] A testator or settlor who contemplates a devise or transfer of money, securities, an insurance policy, or an annuity contract to a minor should consider a will or trust provision either designating a custodian or authorizing a transfer to a custodian to avoid the more cumbersome guardianship proceedings and accountings. In fact, such a custodianship may be desirable in small estates in lieu of a testamentary trust for minor children.

The legislature also amended Indiana Code sections 6-4.1-8-4 and -4.5 to allow the transfer of money held in a joint checking account without the written consent of the county assessor or department of state revenue.[125] The person in possession of the account must, however, notify the department when the money is transferred to the

---

[116]410 N.E.2d at 1384.

[117]IND. CODE § 30-2-8-2.5 (Supp. 1981). Minor housekeeping amendments were made to Indiana Code sections 29-1-7.5-3 (reference to 2(b) changed to 2(c)); 29-1-17-3, -4 (reference to "widow's or family allowance" changed to "the allowance provided by IC 29-1-4-1"); 29-1-18-43 (reference to code sections clarified); 30-2-1.5-2 (minor clarification).

[118]IND. CODE §§ 30-2-8-1 to -10 (1976 & Supp. 1981).

[119]IND. CODE § 30-2-8-2.5 (Supp. 1981).

[120]*Id.* § 30-2-8-2.5(a).

[121]*Id.* § 30-2-8-2.5(b).

[122]*Id.* § 30-2-8-2.5(c) limits the persons who may serve as custodians to adult members of the minor's family, a guardian of the minor, or a trust company.

[123]*Id.* § 30-2-8-2.5(d) limits the type of property that may be transferred to this custodianship to money, securities, life or endowment policies, or annuity contracts. The property is to be transferred or distributed to the custodian in the same manner as it is transferred to a custodian under *id.* § 30-2-8-2.

[124]*Id.* § 30-2-8-2.5(e), (f).

[125]*Id.* § 6-4.1-8-4. This follows last year's amendment of the same section, which allowed transfers of jointly owned personal property to a surviving spouse without the written consent of the department of revenue or county assessor.

surviving joint tenant.[126] Thus, institutions that offer checking accounts may allow immediate withdrawal of funds by a surviving joint tenant without any delay in arranging for an appointment with department of revenue officials. The amendment should obviate the need for a separate account in the joint owner's name to assure the availability of funds for the survivor immediately after the death of a joint checking account owner.

E. Trust Developments

1. Lapse and Conditions of Survival.—In *Hinds v. McNair*,[127] the court of appeals discussed, *inter alia*, the issue of lapse of a beneficial interest in a trust and the circumstances in which a condition of survival may be attached by implication to the trust beneficiary's interest. McNair and his wife created an oral irrevocable inter vivos trust in 1931, and this trust was recognized as existing and valid by the Indiana Supreme Court in 1955.[128] McNair was the sole trustee until his death in 1969, at which time the trust property was to be divided equally between his son and daughter.[129]

McNair's daughter died in 1962, prior to the time for distribution of the trust corpus, and McNair's son argued that the daughter's interest in the trust proerty lapsed upon her death and passed by way of resulting trust to the settlor, McNair.[130] The court of appeals noted that a trust beneficiary's interest might lapse if the beneficiary predeceased the creation of the trust;[131] however, in the

---

[126]*Id.* § 6-4.1-6-4.5(d). Problems may arise over the definition of a checking account.

[127]413 N.E.2d 586 (Ind. Ct. App. 1980).

[128]Hinds v. McNair, 235 Ind. 34, 129 N.E.2d 553 (1955). The trust corpus was stock, and the trust's creation predated the enactment of Indiana Code section 30-4-2-1, which first established the requirement of a writing to create an enforceable trust of personal property. The terms of the oral trust were described by the settlor, McNair, when he testified in the prior action in response to questions apparently requiring him to "articulate 'each and every term' of the trust." 413 N.E.2d at 600 n.11. When the settlor articulated the terms of the trust, he did not mention a reserved power to revoke. *Id.* at 595. The *Hinds* court in the present action concluded that the presumption of irrevocability was not overcome by evidence that the settlor had reserved a power to revoke or modify. *Id.* at 596. Herein the settlor, McNair, Sr., is referred to as McNair, and the son, McNair, Jr., is referred to as the son.

[129]The cosettlors were divorced in 1948, and the wife then relinquished all her interest in the stock forming the trust corpus. Thus, the time for division of the corpus was the time of death of McNair in 1969. 413 N.E.2d at 592.

[130]*Id.* at 596. There was no gift over in the event of the death of the son or daughter. Thus, if one of their interests failed, that interest would return to the settlor by way of resulting trust. *See* note 149 *infra*.

[131]*Id.* at 597. The court noted that the RESTATEMENT (SECOND) OF TRUSTS § 112, Comment f, relied upon by the son, was inapplicable because the daughter survived the creation of the trust. 413 N.E.2d at 596-97. The RESTATEMENT indicates that:

A person who has died prior to the creation of a trust can not be a

Hinds case, the daughter was alive in 1931 when the trust was created, and her interest did not lapse upon her death in 1962. Instead, whatever interest the daughter owned at her death passed intact to her heirs.[132]

The court's discussion of the lapse issue could have been clearer. The court's repeated statements emphasizing that the daughter's interest was vested might lead the casual reader to conclude that a crucial factor in the resolution of the lapse issue was the determination that the daughter's interest was vested as opposed to contingent.[133] Actually, the only relevant factor for lapse purposes was whether the daughter survived the creation of her beneficial interest.

The son also argued that the daughter's interest terminated on her death because it was subject to a condition that she survive until the time for distribution. Although there was no express condition of survival attached to the daughter's interest, the son argued that a condition of survival should be implied.[134] The court of appeals, relying extensively on treatise authority,[135] carefully and exhaustively listed the factors tending to establish a condition of survival and the factors tending to negate the existence of such a condition.[136] Regarding the application of these factors in the analysis of a

---

> beneficiary of the trust. Thus, if property is transferred inter vivos in trust for a named person who is dead at the time of the transfer, no trust is created. In such a case the transferee ordinarily holds upon a resulting trust for the transferor. [I]f a testator devises property in trust for a person who predeceases him, the devise of the beneficial interest lapses, and the person named as trustee ordinarily holds the property upon a resulting trust for the estate of the testator.

[132]RESTATEMENT (SECOND) OF TRUSTS § 112, Comment f (1959) (references omitted). 413 N.E.2d at 599. The heirs take subject to the same conditions to which the beneficiary's interest was subject. Of course, if the interest of the beneficiary was subject to a condition of survival to a certain time, the interest ceases if the beneficiary fails to survive to that time. *See* 2 A. SCOTT, THE LAW OF TRUSTS § 128.8 (3d ed. 1967), *quoted in* 413 N.E.2d at 600.

[133]The daughter's future interest in the trust corpus was technically a vested interest because it was in favor of an ascertainable person and was not subject to a condition precedent. *See generally* Heilman v. Heilman, 129 Ind. 59, 28 N.E. 310 (1891).

[134]The court had concluded that rules of construction applicable to written instruments could be applied, especially since the settlor's intent had been memorialized in testimony. 413 N.E.2d at 600 n.11.

[135]RESTATEMENT OF PROPERTY §§ 249, 250, 252, 254 (1940); R. POWELL & P. ROHAN, 2A THE LAW OF REAL PROPERTY ¶¶ 327-331 (2d ed. 1977).

[136]These positive factors include: (1) the description of the beneficiary by the use of a term connoting survival, such as "heirs" or "next of kin;" (2) a word or phrase describing the beneficiary as one who survives to a later date, such as "if living" or "surviving children;" (3) an alternative limitation using the word "or," such as "to the beneficiary or his children;" or (4) a supplanting limitation containing a gift to the beneficiary and a secondary gift separated by words such as "but if" or "in case." 413

particular limitation, the court quoted from the Powell treatise: "[T]he persuasive value of each [negative] factor increases as it joins forces with another. The [negative] factors themselves vary considerably in persuasive force. Furthermore, these factors are weakened and often overcome by the presence of the postive factors . . . ."[137] The court affirmed the trial court's conclusion that a condition of survival was not attached to the daughter's interest in the trust.[138]

Drafters, of course, should expressly include a condition of survival if one is intended and carefully negate the condition if it is not intended. The factors enumerated in the *Hinds* case should be reviewed by all will and trust drafters, in order to avoid the inadvertent use of language that does not clearly express the settlor's or testator's intent regarding a requirement of survival.

2. Breach of Trust and Removal of Trustees.—In two cases decided during the survey period, the court of appeals affirmed the trial courts' conclusions regarding the occurrence of, and liability for, a breach of trust and regarding the sought-for removal of the trustees. The issues of breach and removal are joined in this survey discussion because the issues were joined in the cases. Breach of trust is ordinarily a sufficient justification for removal of a trustee.[139]

In *Forth v. Forth*,[140] the court of appeals held that the trustees had not breached their duty of non-delegation when they gave proxies to vote shares of corporate stock forming the corpus of the trust.[141] The cotrustees also did not breach the precatory trust

---

N.E.2d at 600-01. The negative factors include: "(1) the absence of both an alternative and a supplanting limitation; (2) identification of the intended takers; (3) language of present gift; and (4) the gift to the future interest holder himself of the *income* from the subject matter of the gift for the period during which possession is denied to him." 413 N.E.2d at 601 (quoting 2A R. POWELL, *supra* note 153, ¶ 331 at 780) (emphasis in original).

[137]2A R. POWELL, *supra* note 153, ¶ 331 at 780.

[138]413 N.E.2d at 600 n.11. Each one of the negative factors was present: there was no limiting language; there was no alternative limitation; the daughter was an identified taker; the settlor used language of present gift in describing his intent that at his death the children would get the stock; and the settlor made a discretionary gift of income to the daughter during the time when possession was denied her. *Id.* at 601.

[139]IND. CODE § 30-4-3-22 (1976) provides that one of the remedies available for breach of trust is removal of the trustee.

[140]409 N.E.2d 1107 (Ind. Ct. App. 1980).

[141]*Id.* at 1115 (citing IND. CODE § 30-4-3-3(a)(15) (1976), which gives specific statutory authority to vote securities by proxy and overrides the general duty of non-delegation stated in *id.* § 30-4-3-6(b)(11)).

The testator's three children and his wife were successor cotrustees of the trust. The action was brought to set aside an election of directors of the corporation which shares formed the corpus of the trust, in which election the complaining cotrustee and her husband were voted off the board, and to instruct the cotrustees to vote the

terms, which expressed the settlor's "desire that there be no change in management so long as the corporation is operated profitably,"[142] when they failed to vote the shares to reelect the complaining cotrustee to the corporate board of directors.[143] Furthermore, the trial court did not abuse its discretion when it refused to award attorney fees to the unsuccessful complaining cotrustee.[144]

In *Donahue v. Watson*,[145] the court of appeals held that the trustee's allocation of capital gains from the sale of trust property to the income beneficiaries was a breach of trust.[146] The trustee was liable to restore the trust principal to the trust,[147] and the trustee was also liable for attorney fees incurred by the beneficiaries in bringing the action for breach of trust.[148] The trustee's breach of trust was sufficient justification for her removal,[149] although her

---

shares in a manner which would insure the complaining cotrustee a seat on the board. The complaining cotrustee also sought to remove the cotrustees and to recover attorney fees. 409 N.E.2d at 110.

[142]409 N.E.2d at 1113.

[143]*Id.* at 1113-14, applying well-settled rules of construction.

[144]*Id.* at 1116. The court offered the following analysis:

> "The right to compensation at the cost of the estate should not depend upon the result of the litigation but rather upon the reasonable necessity for such litigation. And on that subject a court passing on the question of allowances ought to consider not merely the result, but whether the trustees are acting reasonably and in good faith, whether the issue on which they are divided is of little or momentous consequence to the estate or its beneficiaries, whether the facts are undisputed or are so controversial as to require an adversary proceeding for their determination, whether the legal questions are simple or complex, settled by precedents or open to serious debate, and any other matters that bear upon the reasonableness or the necessity for the litigation and the multiple employment of attorneys therein."

Id. (quoting Zaring v. Zaring, 219 Ind. 514, 523, 39 N.E.2d 734, 737 (1942)).

[145]411 N.E.2d 741 (Ind. Ct. App. 1980).

[146]*Id.* at 747-48. The trustee was one of the income beneficiaries. The court of appeals held that the following clause did not give the trustee unfettered discretion in the allocation of income and principal:

> If there be any uncertainty or question as to whether any part of said trust estate be principal or income, or as to whether any cost, charge, expense, tax or assessment thereon should be charged against principal or income, said trustees shall have power, in their discretion, to settle and determine such question.

Id. at 747.

[147]*Id.* at 748 nn.1 & 2.

[148]Donahue v. Watson, 413 N.E.2d 974 (Ind. Ct. App. 1980) (citing IND. CODE §§ 30-4-3-11(b)(4), -22(a) (1976)).

[149]411 N.E.2d at 747-48. The trustee argued that the trial court was not properly presented with the issue of her removal, because objections were not properly filed by the complainants. The court of appeals, citing Indiana Code section 30-4-3-29 and RESTATEMENT (SECOND) OF TRUSTS § 107, stated: "In any event, it is not clear that the

nonresidence alone would not have been sufficient.[150]

3. Constructive Trusts.—In *Forth v. Forth*,[151] the court of appeals held that an action to establish a constructive trust was barred by the six-year statute of limitations applicable in fraud actions.[152] The court concluded that the limitations period began to run at the time the alleged fraud was perpetrated and that the discovery rule, tolling the statute until the fraud was or should have been discovered, was inapplicable because there was no allegation of active and intentional concealment.[153] Neither repudiation by the alleged trustee nor an unsuccessful demand by the beneficiary is necessary to commence the running of the statutory period.[154] The limitations period begins to run when the conduct giving rise to the constructive trust remedy occurs.[155]

---

civil court could not remove the trustee *sua sponte* upon finding sufficient grounds." 411 N.E.2d at 747.

[150]411 N.E.2d at 747.

[151]409 N.E.2d 641 (Ind. Ct. App. 1980).

[152]IND. CODE § 34-1-2-1 (1976).

[153]409 N.E.2d at 644-45.

[154]*Id.* at 644. The court contrasted this rule with that of the time of commencement of a cause of action for breach of express trust, where an open repudiation by the trustee or an unsuccessful demand for trust property by the trust beneficiary is required to commence the running of the statute of limitations. *Id.*

[155]*Id.*

VIII. Domestic Relations

PAMELA RHINE*
ANNE H. WEINHEIMER*

A. *Adoption*

Under Indiana law, parental rights may be terminated voluntarily or involuntarily through court action. If parental rights are terminated in connection with an adoption proceeding, adoption statutes apply.[1] If they are terminated by the state as a result of abandonment, neglect, or abuse, the juvenile code applies.[2] The statutes set out strict criteria which must be met to effectuate involuntary termination,[3] but few safeguards exist for voluntary terminations.[4]

A problem which arises with some regularity in conjunction with voluntary terminations is that of the withdrawal of parental consent once it is given. In *Snyder v. Shelby County Department of Public Welfare*,[5] the mother signed a consent to the *adoption* of her children and her voluntary relinquishment of parental rights but later sought to withdraw the consent, claiming that she had a right to make a timely withdrawal and that she had signed under duress and without understanding the consequences of her signature.[6] The court of appeals held that no right to make a timely withdrawal of consent exists, "[t]herefore, a parent who executes a voluntary relinquishment of parental rights is bound by the consequences of such

---

*Pamela Rhine is a third-year student at the Indiana University School of Law, Indianapolis and is an Associate Editor of the *Indiana Law Review*. Anne H. Weinheimer is also a third-year student at the Indiana University School of Law, Indianapolis and is a Note and Development Editor of the *Indiana Law Review*.

[1]IND. CODE § 31-3-1-6 (Supp. 1981).

[2]*Id.* § 31-6-5-4.

[3]For involuntary termination of parental rights in connection with an adoption proceeding, see *id.* § 31-3-1-6(g). For involuntary termination under the juvenile code, see *id.* § 31-6-5-4.

[4]*Id.* § 31-6-5-2 provides that for a voluntary consent to be effective in a *juvenile proceeding*, the contesting parent must be advised of his constitutional and other legal rights. It further provides that a parent who is incompetent may give his consent only with approval of the court or his guardian. *Id.* § 31-6-5-2(e).

[5]418 N.E.2d 1171 (Ind. Ct. App. 1981).

[6]During the trial court proceedings, conflicting evidence was presented concerning the duress issue. The mother sought to discover the contents of the caseworker's notes claiming they would substantiate her claim of duress. *Id.* at 1176. The trial court ruled that the caseworker's notes were "work product" and therefore not subject to discovery. Such material is subject to discovery only upon a showing of good cause. *See* IND. R. TR. P. 26(B)(2). The appellate court held that a caseworker's notes are not work product and are therefore subject to discovery. 418 N.E.2d at 1178.

action, unless the relinquishment was procured by fraud, undue influence, duress, or other consent-vitiating factors."[7]

When consent is not given in an adoption proceeding, parental rights will be terminated if a parent fails for one year to communicate significantly with the child without justifiable cause and when able to do so.[8] In *Herman v. Arnold*,[9] the child's parents were divorced in 1974 and the mother retained custody. In the year of the divorce, the father was convicted of two counts of murder and at the time of the adoption proceeding was serving a life sentence in prison. The mother remarried in 1974 and subsequently her second husband, who had cared for and supported the child since the marriage, sought to adopt the child without the father's consent. The father claimed that his incarceration had prevented him from supporting and communicating with his child. The court of appeals held that incarceration did not automatically toll the running of the one year statutory period because the father's continued communication with others through letters and telephone calls was evidence that he could have communicated with his child.[10] The court also stated that the one year period of no communication need not be for the year just prior to the petition to terminate.[11] Concurring separately, Judge Garrard stated that the pre-incarceration evidence concerning the father's lack of interst in the child supported an unfavorable inference concerning the father's attitude toward his child.[12] Judge Garrard stated further that, without such an inference, incarceration might constitute a justifiable cause for failure to communicate.

The court of appeals applied the new juvenile code[13] in the case of *In re Miedl*,[14] another involuntary termination case. This much-cited case offers a valuable interpretation of Section 4 of the juvenile code,[15] which sets out five conditions which must be met before a petition to terminate parental rights without consent can be granted.[16]

---

[7]418 N.E.2d at 1180. The appellate court remanded the case for a determination on the duress issue. *Id.* at 1178.

[8]IND. CODE § 31-3-1-6(g) (Supp. 1981).

[9]406 N.E.2d 277 (Ind. Ct. App. 1980).

[10]*Id.* at 280.

[11]*Id.* at 279. In the concurring opinion, Judge Garrard expressed concern that a one year period of non-communication might be used several years later to effectuate a termination of parental rights. *Id.* at 281.

[12]*Id.* at 281.

[13]IND. CODE §§ 31-6-1-1 to -11-21 (Supp. 1981). The "new" juvenile code was enacted in 1978 as part of P.L. 136 and took effect Oct. 1, 1979.

[14]416 N.E.2d 491 (Ind. Ct. App. 1981).

[15]IND. CODE § 31-6-5-4 (Supp. 1981).

[16]*Id.* It should be noted that this section applies only to cases where the child has been adjudicated a delinquent child or a child in need of services. *Id.* § 31-6-5-3(6)(A) (Supp. 1981).

The court in *Miedl* identified ambiguities in Section 4(1) and attempted to resolve them. Subsection (1) provides that a child must be removed from his parent for at least six months under a dispositional decree before involuntary termination can take place.[17] The court construed this to mean that the parent must not have had *physical custody* of the child for six months *immediately preceeding* the filing of the petition.[18] The welfare department agreed that the six month period must be immediately preceeding the petition for termination but contended that removal from the parent need not be physical but might be accomplished by making the child a ward of the court without removing the child from the parent.[19] In refusing to accept this interpretation, the court emphasized the use of the word "removed," interpreting it to mean *physical* removal.[20]

In *Washington County Department of Public Welfare v. Konar*,[21] the mother of a two day old infant signed a voluntary termination of parental rights. Two months later the welfare department filed a petition to terminate parental rights and the mother then filed a notice of rescission on the voluntary relinquishment. The trial court, applying the old juvenile code,[22] denied the rescission. The appellate court ruled that the new code was applicable,[23] which allows a natural parent to recant a voluntary relinquishment of parental rights.[24] To support this position, the court cited a section which is applicable only to *involuntary* terminations.[25] One must assume that the court inferred such a statutory right from the two preceeding sections which apply to consensual terminations.[26] These sections do not explicitly give parents a right to recant, but they do provide that such parental consent must be given in open court unless (1) the consent was given in writing; (2) the parents were given notice of their legal rights prior to the signing of the consent; *and* (3) the parents failed to appear in court.[27] This provision implicitly gives parents the right to withdraw their consent prior to a court ruling.

---

[17]*Id.* § 31-6-5-4(1) (Supp. 1981).

[18]416 N.E.2d at 494.

[19]*Id.*

[20]*Id.* at 494-95.

[21]416 N.E.2d 1334 (Ind. Ct. App. 1981).

[22]IND. CODE § 31-5-7-1 (1976) (repealed 1978). The "old" code was effective at the date of the originial filing, June 8, 1979, but the new code was effective at the time of trial, April 23, 1980.

[23]416 N.E.2d at 1334-35. In applying the new code, the appellate court stated that any dispositional decree entered before the effective date of the new code (Oct. 1, 1979) would come under the old code but any pending case would come under the retroactive application of the new code. *Id.*

[24]*Id.* at 1335.

[25]*Id.* at 1334 (citing IND. CODE § 31-6-5-4 (Supp. 1981)).

[26]IND. CODE §§ 31-6-5-2, -3 (Supp. 1981).

[27]*Id.* § 31-6-5-2(c).

However, the next section, entitled "Advice to Parents," states that parents must be advised that "their consent is permanent and cannot be revoked or set aside unless it was obtained by fraud or duress, or unless the parent is incompetent."[28] These two sections, read together, indicate that the court will guard against parental consents obtained through fraud or duress by refusing to accept a written consent if the parent appears personally at the termination proceeding. It also indicates that once oral consent is given in court *or* the court is convinced of the validity of a written consent, the consent is permanent unless the consenting parent can prove fraud or duress.

In re Leckrone[29] involved an involuntary termination of parental rights in connection with an adoption proceeding.[30] On appeal, the court stated that although a lower court ruling will generally not be set aside unless clearly erroneous, when a fundamental right such as the integrity of the family unit is involved, a higher standard of review will be imposed. Under this higher standard, the lower court's ruling will be set aside unless "the evidence clearly, cogently, and indubitably establishes one of the . . . criteria for granting an adoption without consent."[31] The court reiterated this standard of review in *Graham v. Starr*[32] and further stated that a court need not consider the child's best interests in the adoption until one of the statutory requirements allowing adoption without consent has been met.[33]

In *Johnson v. Capps*,[34] the court of appeals held that the trial court had jurisdiction over a case which terminated the parental rights of a California mother in a child who resided in Illinois. The father, a resident of Indiana, sued in Indiana to have the mother's rights terminated to clear the way for a possible adoption by his spouse should he remarry. The trial court terminated the mother's parental rights.[35] On appeal, the mother claimed that the lower court lacked subject matter jurisdiction under the Uniform Child Custody

---

[28]*Id.* § 31-6-5-3(1).

[29]413 N.E.2d 977 (Ind. Ct. App. 1980).

[30]*Id.* The children had been found to be dependent children and were made wards of the court in 1976. The welfare department had worked with the mother prior to this time and continued to work with her subsequently to help her improve her living conditions but their efforts had failed. *Id.* at 978-79.

[31]*Id.* at 979.

[32]415 N.E.2d 772 (Ind. Ct. App. 1981).

[33]*Id.* at 774. The stepfather sought to adopt his wife's daughters thus terminating the natural father's parental rights without consent. The stepfather claimed that the father had failed, unjustifiably, to contribute to the girls' support. The court ruled that the failure to support was justified by the father's ill health and inability to work. *Id.*

[34]415 N.E.2d 108 (Ind. Ct. App. 1981).

[35]*Id.* at 110.

Jurisdiction Act (UCCJA).[36] Due to a lack of a directly pertinent statute, the appellate court, ruling that UCCJA was inapplicable to the case because this was not a custody determination, applied the adoption statute[37] to determine subject matter jurisdiction. The adoption statute confers jurisdiction over adoption proceedings on the court which has probate jurisdiction in the county in which the "petitioner" resides. Applying this statute, the court held that the trial court had subject matter jurisdiction.

This decision seems to run counter to logic. The two people whose rights were directly affected by this ruling were subject only by waiver to the court's personal jurisdiction. The state of Indiana's interest in the case was tenuous, resting on future uncertainties: the child involved *might* be adopted by a potential spouse of the father at some later date and then *might* reside in the state. As the dissent points out, the adoption statute applied in this case by the majority describes "petitioner" as "a resident desirous of adopting."[38] Not only was this not an adoption proceeding but the petitioner was the natural father who of course would never petition to adopt the child. The Indiana adoption code also provides for two other instances under which jurisdiction may be found: when the child resides in the state, or when the custodial agency is located within the state.[39] In this case, Indiana was neither the residence of the child nor the location of the custodial agency and the father did not fit within the definition of "petitioner" in the remaining category which allows jurisdiction. Construing literally the relevant statutory provisions, no subject matter jurisdiction existed. Because subject matter jurisdiction is never waived,[40] the termination proceeding should have been dismissed.

B. Child Custody

1. Jurisdiction.—The case of *In re Lemond*,[41] merits note in this Survey for a second consecutive year. In the 1980 Survey, the court of appeals decision that Indiana lacked jurisdiction over the case was discussed.[42] Subsequent to the court of appeals decision, the petitioner was granted a stay by the circuit court pending an ap-

---

[36]IND. CODE §§ 31-1-11.6-1 to -24 (Supp. 1981).

[37]*Id.* § 31-3-1-1 (1976).

[38]*See id.*

[39]*Id.*

[40]IND. R. TR. P. 12(b)(1), 12(h).

[41]413 N.E.2d 228 (Ind. 1980).

[42]Garfield, *Domestic Relations, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 315, 322-23 (1981) (discussing *In re* Lemond, 395 N.E.2d 1287 (Ind. Ct. App. 1979)).

peal to the Indiana Supreme Court. The supreme court denied the transfer and dissolved the stay.[43]

In *Lemond*, the father, mother, and daughter were all residents of Hawaii at the time of the divorce and the original custody decree was issued by an Hawaiian court. The court gave the couple joint custody, with the father retaining physical custody. The decree also provided that if either party left Hawaii for a change of residence, physical custody would be transfered to the mother.[44] The father remarried and moved to Indiana, bringing the child with him. He sought custody modification through the Indiana courts but the court of appeals held that the Indiana courts lacked jurisdiction. When the mother traveled to Indiana to get her daughter, she was denied custody by the Indiana court.[45] The reason for the denial soon became apparent. The father and his attorneys were attempting to circumvent the Indiana Supreme Court order by having the child declared a child in need of services under the juvenile code.[46] The judge who was presented with the petition to have the child declared in need of services stated that he believed the action to be an "end run,"[47] but instead of dismissing the action, he disqualified himself and a special judge was chosen to preside. The special judge found the child to be in need of services even though no evidence was presented to support the decision.[48] The mother's counsel moved for dismissal claiming that the court lacked jurisdiction and was acting in defiance of the supreme court order, but the motion was denied.[49]

One week after the mother was to have received custody of the child pursuant to the supreme court's order, the court of appeals and the Indiana Supreme Court issued an order to show cause, requiring the father, his attorney and the lower court judges[50] to appear and "show cause why they should not be held in indirect criminal contempt."[51] Five days later, the courts, in joint session, ordered the daughter to be immediately turned over to her mother.[52] The courts found that the juvenile proceedings were a sham and held the

---

[43]413 N.E.2d at 228.

[44]*Id.* at 231.

[45]*Id.* at 233.

[46]IND. CODE § 31-6-4-3 (Supp. 1981).

[47]413 N.E.2d at 223.

[48]*Id.*

[49]*Id.* In dismissing the motion, the special judge stated: "This is a new case, it has nothing to do with the other case. This cause is new to me, it is filed in this Court under a new number, it is not any part of the other case." *Id.* at 240.

[50]The order was issued to the regular judge of the lower court, as well as to the special judge.

[51]*Id.* at 234.

[52]*Id.* at 236-37.

attorneys and the judges in contempt of court, fining them $500 each.[53] The courts issued the following warning:

> It is not often that either of these Courts is forced to exercise its inherent contempt powers. These courts earnestly hope that this case sounds a clear warning to the bench and bar that behavior of the sort presented in this case will not be tolerated. Moreover, while only a fine was imposed here, these Courts also have the authority to impose prison terms, and quite likely will exercise this prerogative in the future.[54]

In *Schleiffer v. Meyers*,[55] the United States Court of Appeals for the Seventh Circuit was faced with another jurisdictional question, this one involving a foreign country. In this case, a son was born in Sweden to an American father and a Swedish mother. The couple later received a divorce in Sweden and custody was awarded to the mother. The father brought the child to the United States and sought modification of the custody decree. Judge Meyers of the Whitley County Circuit Court found that the Indiana Uniform Child Custody Jurisdiction Act (UCCJA)[56] applied to the case and that it provided for international recognition of foreign decrees.[57] Therefore, the court held that Indiana did not have jurisdiction and ordered that the Swedish decree be enforced.[58]

The child, by next friend, sought an injunction in federal court against enforcement of the circuit court order. The federal district court, finding that the case involved only child custody issues, and not civil rights violations, refused to grant the requested injunctive relief.[59] On appeal to the court of appeals, the child claimed that his constitutional right to live in the United States was being violated and that the lower court's ruling amounted to deportation.[60] The appellate court noted that domestic relations is "generally considered a state law matter outside federal jurisdiction"[61] but proceeded to rule on the constitutional claim. The court held that the Indiana court's recognition of the Swedish decree did not violate the child's constitutional right to reside in the United States and did not amount to deportation[62] because the child retained his United States

---

[53]*Id.* at 237-38. The courts did not find the father in contempt.
[54]*Id.* at 249.
[55]644 F.2d 656 (7th Cir. 1981) (applying Indiana law).
[56]IND. CODE §§ 31-1-11.6-1 to -24 (Supp. 1981).
[57]*Id.* § 31-1-11.6-23.
[58]644 F.2d at 659.
[59]*Id.* at 660.
[60]*Id.* at 662.
[61]*Id.* at 663.
[62]*Id.*

citizenship and his right to choose his residence when he reaches majority.

2. Rights of the Homosexual Parent.—In *D.H. v. J.H.*,[63] the mother and father had been married for fourteen years and had three children at the time of dissolution of marriage. At the custody hearing, both parents claimed to be devoted to the care and upbringing of the children. Evidence was introduced which indicated that the mother had had two homosexual affairs and that she was not a model housekeeper. No evidence was introduced concerning the father's housekeeping habits.

Indiana statutory law provides, by negative implication, that evidence of a parent's sexual activity is relevant only to the extent that it has an effect on the best interests of the child.[64] However, up to this time, the sexual activity considered by the courts had been heterosexual, rather than homosexual. Although in this case it appeared that the children had little, if any, knowledge of homosexual activity on the part of the mother, the trial court gave custody to the father. The appellate court ruled that evidence of homosexual activity should be treated in the same manner as evidence of heterosexual activity and, therefore, "such evidence alone is insufficient, without evidence of an effect on the children, to render the parent unfit."[65] However, the court also held that the lower court's finding could be based on other criteria, such as the mother's habits of leaving dirty dishes stacked in the sink and leaving laundry on the furniture rather than putting it away and therefore, the lower court's ruling was not so unsubstantiated as to constitute an abuse of discretion.[66]

3. Custody Modification.—In the case of *Whitman v. Whitman*,[67] the father petitioned the court to modify its original decree giving custody to the mother. He offered evidence that the mother had failed to adequately care for the children for a period of months during the previous year.[68] The trial court granted the modification and gave custody to the father. On appeal, the court ruled that Indiana law requires that custody modification occur only when there has been a substantial and continuous change in circumstances.[69] Since the mother had remedied the inadequacies prior to the request for modification, the changed circumstances were not continuous and modification was not allowed.[70]

---

[63]418 N.E.2d 286 (Ind. Ct. App. 1981).
[64]IND. CODE § 31-1-11.5-21 (1976).
[65]418 N.E.2d at 293.
[66]*Id.* at 296.
[67]405 N.E.2d 608 (Ind. Ct. App. 1980).
[68]*Id.* at 610.
[69]*Id.* at 610-11 (citing IND. CODE § 31-1-11.5-22(d) (1976)).
[70]405 N.E.2d at 611.

In *Needham v. Needham*,[71] the court was required to interpret the statutory requirement for custody modification of a substantial change in circumstances.[72] The circuit court ruled that the mother's antagonistic attitude toward the father and her attempts to "poison" the minds of the children against the father constituted substantial change, justifying modification of the decree.[73] The appellate court stated that it would not reverse the decision of the lower court unless it was clearly erroneous. It further stated that:

> At first glance, we did not see how a change of custody from the mother to the father would appreciably change this situation. However, it is apparently the trial court's determination that the change of custody will substantially diffuse the harm that is being caused to the children by reducing the amount of exposure to the mother and providing a more stable environment.[74]

It appears that the "strong continuing antagonism between the divorced parents,"[75] though arguably substantial and continuous, existed at the time of the original decree and so was not a *change* in circumstances. The appellate court seemed to be aware of this problem, stating that "there are other changes which no doubt were a factor in the trial court's decision."[76] It went on to recount the mother's remarriage and divorce and the husband's seemingly stable remarriage. Although the *change* in circumstances in this case may have been marginal, the court emphasized the best interests of the children, and recognized that the present arrangements were problematic.

4. Visitation.—A parent has a statutory right to visit his child unless it can be shown that such visitation will result in a substantial risk of harm to the child.[77] However, in *In re Joseph*,[78] the court of appeals ruled that once a child is found to be in need of services (CHINS),[79] the state has a compelling interest in protecting the child which justifies the court in looking only to the best interests of the child.[80] The standard of proof required to prevent visitation also

---

[71]408 N.E.2d 562 (Ind. Ct. App. 1980).

[72]*Id.* (citing IND. CODE § 31-1-11.5-22(d) (1976)).

[73]408 N.E.2d at 564.

[74]*Id.*

[75]*Id.*

[76]*Id.*

[77]IND. CODE § 31-1-11.5-24 (1976). A parent also has a fundamental right to maintain the integrity of the family under U.S. CONST. amend. XIV. *See* Stanley v. Illinois, 405 U.S. 645 (1972).

[78]416 N.E.2d 857 (Ind. Ct. App. 1981).

[79]IND. CODE § 31-6-4-3 (Supp. 1981). CHINS is the acronym for the Child in Need of Services statute.

[80]416 N.E.2d at 858-59.

changes once a child is found to be a CHINS. When a fundamental right such as parental visitation is involved and the state is seeking to intervene, the standard of proof is "clear and convincing" because only one individual's fundamental rights are at stake, but when a child has been ruled a CHINS, two persons' rights are involved, the parent's and the child's.[81] Therefore, the state is required to show only by a "preponderance of the evidence" that it would be in the child's best interest to deny visitation.[82]

During the survey period, the Indiana General Assembly passed a bill permitting grandparents to petition for visitation rights when separated from their grandchild due to divorce or death of a parent.[83] The statute provides that the court may provide grandparents with a right of visitation if it finds that such visitation would be in the child's best interests.

The case of *Krieg v. Glassburn*[84] was decided before the effective date of the new grandparent visitation statute[85] but seems to be consistent with the new statute. In *Krieg*, the maternal grandparents claimed visitation rights. Their daughter and son-in-law had obtained a divorce ten years earlier and the father had been granted custody. The father remarried and his second wife filed a petition for adoption. The location of the mother was unknown at the time of this petition.[86] The grandparents claimed not only a right to visit but also a right to intervene in the adoption.[87] The trial court ruled that grandparents have no right to visitation and therefore have no standing to intervene in an adoption.[88] However, the court of appeals held that although Indiana provided no statutory right of visitation,[89] the courts have held that grandparents can obtain visitation by overcoming the parent's prima facie rights with a proper showing that visitation would be in the child's best interest.[90] The court held further that Indiana's adoption statutes give grandparents no standing to intervene in an adoption proceeding.[91] Although the right to

---

[81]*Id.* at 864.

[82]*Id.* at 863.

[83]IND. CODE §§ 31-1-11.7-1 to -6 (Supp. 1981).

[84]419 N.E.2d 1015 (Ind. Ct. App. 1981).

[85]IND. CODE §§ 31-1-11.7-1 to -6 were adopted by the General Assembly on April 27, 1981.

[86]419 N.E.2d at 1016.

[87]*Id.* at 1016-17.

[88]*Id.* at 1017.

[89]*Id.* at 1019. *But see* IND. CODE §§ 31-1-11.7-1 to -6 (Supp. 1981).

[90]419 N.E.2d at 1019.

[91]*Id.* at 1020. The court further noted that any visitation rights existing in the grandparents would be automatically terminated by a final decree of adoption. *Id.* at 1021 n.6.

visitation is now a *statutory* right provided to grandparents, it appears that cases like *Krieg* will be unaffected.

C. Child Support

1. Duty to Support.—In *Johnson v. Ross*,[92] the child involved was born out of wedlock two years before the child's mother married. After the marriage, the husband executed an affidavit of legitimation, claiming the child to be his own. One year later, the couple was divorced and no support was awarded because both parties had stated that no children were born of the marriage.[93] Several years later, the mother brought suit under the Indiana Uniform Reciprocal Enforcement of Support Act (URESA)[94] seeking child support. The circuit court ordered the former husband to pay support.[95] On appeal, the former husband claimed that under URESA, there must be a pre-existing judicial determination of a duty to support before support can be imposed. He also claimed that since both he and his former wife agreed that he was not the natural father, he had no duty to support the child. The court of appeals held that a court acting under URESA can make the initial determination of a duty to support and that the former husband's voluntary legitimation provided ample evidence on which to base a decision to impose the statutory duty to support.[96]

In *Dorsey v. Dorsey*,[97] the child was born out of wedlock but the mother married the natural father after the child's birth. The child did not carry the father's surname and the mother did not seek the establishment of paternity.[98] When the couple divorced, neither party listed any children of the marriage but both admitted to the court that they were the natural parents of a child.[99] The trial court, on its own motion, changed the child's surname to that of the father and ordered him to pay support.[100] The appellate court affirmed the decision stating that the best interests of the child were of paramount importance and that it could only be in the child's best interest to order support.[101]

2. Delinquency in Payment of Support.—In *Rohn v. Thuma*,[102]

---

[92]405 N.E.2d 569 (Ind. Ct. App. 1980).
[93]*Id.* at 570-71.
[94]IND. CODE §§ 31-2-1-1 to -39 (Supp. 1981).
[95]405 N.E.2d at 569.
[96]*Id.* at 571.
[97]409 N.E.2d 1233 (Ind. Ct. App. 1980).
[98]*Id.* at 1234.
[99]*Id.*
[100]*Id.*
[101]*Id.* at 1235.
[102]408 N.E.2d 578 (Ind. Ct. App. 1980).

the husband and wife were divorced in 1967, and the mother was awarded custody of the two sons, aged nine and ten years. The support order contained a provision which required the father to provide each child with a four year undergraduate education[103] and to pay all extraordinary dental bills approved by the father.[104]

Both sons were gifted students and were accepted for admission to Vassar and the University of Chicago respectively. Both also received partial scholarships and worked part time but the remaining expenses equalled $3,732 per year. The father interpreted the support order as meaning that he was obligated to provide only enough money for an education at a state university. He therefore sent each son $481 per semester and refused to pay more. The father also refused to pay dental bills for work that he had not approved.[105]

The mother filed suit charging the father with contempt for failure to pay the full amount needed for school and the dental bills. The trial court agreed with the father's interpretation of the original decree[106] and the mother appealed. The appellate court ruled that the father could not be found in contempt because the support provisions were subject to different interpretations. Therefore, the father was not guilty of willful disobedience.[107] The court went on to interpret the provisions of the original decree which were in question. The court stated:

> We believe that since in the *absence* of any agreement, a father's duty to educate depends upon the social and financial circumstances, so, too, where an ambiguous education provision is *included* in the decree those same social and financial considerations are relevant in determining the limits of a father's financial responsibility.[108]

Since the father's ability to pay was not at issue at the trial court level, the decision relieving him of a duty to pay more for his sons' education was reversed. The court also held that it was an abuse of discretion for the trial court to fail to require the father to pay the dental bills.[109] The dental work was necessary, so the failure to obtain the father's approval was not substantial non-compliance with the support provision.

---

[103] *Id.* at 579.
[104] *Id.*
[105] *Id.* at 583.
[106] *Id.* at 579.
[107] *Id.* at 581-82.
[108] *Id.* at 583.
[109] *Id.* at 584.

In *Whitman v. Whitman*,[110] the mother sued for delinquent support. The father admitted his delinquency but introduced evidence proving that he had supplied the children with toys, clothing, food, and entertainment. The trial court awarded the mother delinquent support but, in calculating the amount due, it deducted the value of the father's contribution "in kind."[111] The appellate court reversed, holding that one purpose of an award of support is to give the custodial parent the ability to budget the combined resources and use his or her discretion in the use of those resources.[112] For support "in kind" to be credited in the manner used by the lower court, there must be a provision in the decree allowing such a credit, or the decree must be modified.[113]

The Indiana General Assembly added a support provision which allows courts to assess an interest charge on delinquent support payment.[114] However, since this is an amendment to the paternity statute rather than to the divorce statute, it apparently applies only in the case of illegitimate children. The interest charge is to equal one percent per month of the unpaid balance and can be collected in the same manner as support payments.

D. Dissolution

1. Legal Separation.—During the past year, the general assembly passed legislation which provides for legal separations.[115] A decree for legal separation shall be issued[116] based upon a finding by a court that conditions render living together intolerable for both parties. The proceedings commence with the filing of a petition.[117] The only residency requirement is that one of the parties reside in the state for six months[118] and in the county for three months[119] before filing the petition. A provisional decree or order for legal separation will remain in effect until it expires or a petition or counter petition for dissolution is filed.[120] The legal separation decree may not include an order for maintenance payments extending beyond the legal separation period.[121]

---

[110]405 N.E.2d 608 (Ind. Ct. App. 1980).
[111]*Id.*
[112]*Id.* at 613-14.
[113]*Id.* at 614.
[114]IND. CODE § 31-6-6.1-15.5 (Supp. 1981).
[115]*See* IND. CODE §§ 31-1-11.5-1 to -20 (Supp. 1981).
[116]*Id.* § 31-1-11.5-3(c).
[117]*Id.* § 31-1-11.5-4(b).
[118]*Id.* § 31-1-11.5-6(a).
[119]*Id.* § 31-1-11.5-6(b).
[120]*Id.* § 31-1-11.5-8.5.
[121]*Id.* § 31-1-11.5-9.

2. Maintenance.—The Indiana courts have limited power to award spousal maintenance,[122] so the number of cases involving maintenance awards is small. In *Melnik v. Melnik*,[123] the single case on this issue decided during the survey period, the wife appealed the trial court's refusal to award maintenance payments to her. She claimed that the trial court incorrectly based its decision on her husband's ill health, rather than considering only her inability to work and thereby acted contrary to the statute. The court of appeals, after determining that the trial court did not need to make a specific finding regarding the wife's inability to support herself, held that the statute allows a court to make a maintenance award when a spouse is incapacitated, but does not require it to do so.[124] The *Melnik* court relied on the rule established in *Temple v. Temple*[125] which interpreted Indiana statutory law[126] as allowing the court to consider "the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance."[127]

3. Property Settlements.—In several cases decided during the survey period, the court of appeals refused to find that the trial court abused its discretion in dividing marital property unequally.[128] The only reversal for abuse of discretion in a property division case occurred in *Wilson v. Wilson*.[129] In *Wilson*, the trial court failed to treat property inherited by the husband as marital property subject to division.[130] The appellate court, in setting aside the judgment, held that the trial court abused its discretion in considering the inherited property only to the extent of calculating its value.[131] The *Wilson* court applied the rule established in *In re Marriage of*

---

[122]*See id.* §§ 31-1-11.5-9(c) & -11(c) (Supp. 1981).

[123]413 N.E.2d 969 (Ind. Ct. App. 1980).

[124]*Id.* at 972.

[125]164 Ind. App. 215, 219-20, 328 N.E.2d 227, 229-30 (1975).

[126]IND. CODE § 31-1-11.5-9(c) (1976) (amended 1981).

[127]164 Ind. App. at 219-20, 328 N.E.2d at 229-30.

[128]*See* Cornett v. Cornett, 412 N.E.2d 1232 (Ind. Ct. App. 1980); Wilson v. Wilson, 409 N.E.2d 1169 (Ind. Ct. App. 1980); Tener v. Tener, 407 N.E.2d 1198 (Ind. Ct. App. 1980); Irwin v. Irwin, 406 N.E.2d 317 (Ind. Ct. App. 1980).

The Indiana dissolution statutes provide for a "just and reasonable" division of marital property. IND. CODE § 31-1-11.5-11 (Supp. 1981). Because the disposition of those assets is within the discretion of the trial court, Irwin v. Irwin, 406 N.E.2d 317 (Ind. Ct. App. 1980), the appellate courts will only reverse if the trial court has abused its discretion. *Id.*

[129]409 N.E.2d 1169 (Ind. Ct. App. 1980).

[130]*Id.* at 1174-75. By excluding the husband's inherited property from the marital property to be divided, the trial court awarded more than eighty percent of the assets. *Id.* at 1172.

[131]*Id.* at 1174.

Dreflak,[132] that "[t]he 'one pot' theory preserved by Ind. Code 31-1-11.5-11(b) specifically prohibits the exclusion of any assets from the scope of the trial court's power to divide and award."[133] In *Wilson*, the appellate court held that, under the *Dreflak* rule, the trial court abused its discretion.[134] While the court must consider inherited property, factors such as the length of time such property was held during the marriage may affect how the property is divided.[135]

In *Melnik v. Melnik*,[136] the court of appeals allowed an order to stand which, in effect, divided the assets based on the value as of the date of separation. The trial court held that "the assets of the parties should be equally divided."[137] Before the final decree was issued, the wife gave $25,000.00 to the grandchildren. The court ordered that the $25,000.00 be considered part of the $203,000.00 awarded to her as her share of the property. The court of appeals held that this decision was not error and that the court could consider individual acts of dissipation after separation.[138]

In *Irwin v. Irwin*,[139] however, payments of debts by the husband after the final hearing but before the decree were not credited to him.[140] The trial court awarded sixty percent of the assets to the wife. The husband sought credit for payments which he had made on various debts.[141] The court, on appeal, refused to grant credit for two reasons: first, the trial court had heard testimony as to payments the husband made and the court of appeals could not reweigh evidence;[142] second, the parties agreed that debts were to be paid out of the proceeds from the sale of marital property, so "the husband must be deemed to have volunteered the amounts he expended on the parties' debts."[143] The decision in *Irwin* is consistent with

---

[132]393 N.E.2d 773 (Ind. Ct. App. 1979).

[133]*Id.* at 776.

[134]409 N.E.2d at 1175.

[135]A petition for rehearing of the *Dreflak* decision was denied. 402 N.E.2d 1284 (Ind. Ct. App. 1980). The court of appeals emphasized that it would "engage in any reasonable presumption in favor of the trial court's judgment." *Id.* at 1285. The court also noted that the ambiguity of the judgment precluded a finding of abuse of discretion. *Id.* For a discussion of the 1979 opinion, see Garfield, *Domestic Relations, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 315, 345-46 (1981).

[136]413 N.E.2d 969, 972-73 (Ind. Ct. App. 1980). For a discussion of additional issues in *Melnik*, see notes 122-24 *supra* and accompanying text.

[137]*Id.* at 972.

[138]*Id.* at 973.

[139]406 N.E.2d 317 (Ind. Ct. App. 1980).

[140]*Id.* at 320.

[141]*Id.* at 318.

[142]*Id.* at 320.

[143]*See* note 175 *infra* and accompanying text.

Melnik to the extent that the court of appeals, in both cases, refused to find an abuse of discretion.

Treatment of property to be received by one spouse in the future has been considered in several cases.[144] While statutory law prevents division of property received after the final separation,[145] there is some support for the consideration of future income, such as a vested pension, in determining a "just and reasonable" division of the property.[146] Inclusion in the marital assets of an award of $2,240.00 received by the husband, after the final separation, was error, although the appellate court noted that the amount could be "taken into consideration by the trial court in determining the just and reasonable manner in which the parties' total marital assets are to be distributed."[147]

4. Attacks on Dissolution Decrees.—In *Scherer v. Scherer*,[148] the husband appealed a summary judgment denying his petition for dissolution. The central issue was whether Indiana would recognize a divorce obtained in the Dominican Republic, for which only the wife had applied in person, but for which the husband had executed a special power of attorney.[149] The court stated that, in most cases, recognition of foreign decrees is limited to cases in which at least one spouse was domiciled in the foreign country.[150] In this case, however, although only the wife had appeared in person in the Dominican Republic and neither party was domiciled there, the husband was estopped from denying the validity of the decree which incorporated a separation agreement signed in Indiana by both parties. The husband had claimed that he did not fully understand the effect of the power of attorney form that he signed. The court ruled that even if his claims were true, his later conduct estopped him from denying the validity of the decree.[151] Not only had the husband told friends about the divorce and announced his plans to remarry, but his wife had in fact remarried in reliance on the decree. Because

---

[144]*See* Morgan v. Cooper, 415 N.E.2d 729 (Ind. Ct. App. 1981); Wilson v. Wilson, 409 N.E.2d 1169 (Ind. Ct. App. 1980); Irwin v. Irwin, 406 N.E.2d 317 (Ind. Ct. App. 1980).

[145]IND. CODE § 31-1-11.5-11(b) (Supp. 1981). The statute authorizes consideration of "the earnings or earning ability of the parties as related to a final division of property and final determination of the property rights of the parties," *id.* § 31-1-11.5-11(b)(5), as well as "the economic circumstances of the spouse at the time the disposition is to become effective." *Id.* § 31-1-11.5-11(b)(3).

[146]*Id.* § 31-1-11.5-11(b).

[147]406 N.E.2d at 319-20.

[148]405 N.E.2d 40 (Ind. Ct. App. 1980).

[149]*Id.* at 43.

[150]*Id.* at 44.

[151]*Id.* at 47-48.

the husband behaved inconsistently with his objections, he had waived his right to object.[152]

While acknowledging that summary judgment is not an appropriate method of granting a divorce, the court recognized the Dominican Republic decree as a defense to a dissolution action. Thus, summary judgment was appropriate.[153]

5. *Enforcement of Judgments.*—In *Neal v. Neal*,[154] the wife attempted to recover unpaid alimony[155] through a contempt of court proceeding. The trial court entered judgment increasing the husband's weekly payments by $25.00 and ordered him to pay the remainder of the arrearage when he was financially able.[156]

The court of appeals reversed, holding that "contempt proceedings may not be used to enforce collection of an alimony judgment."[157] The wife asserted that statutory law provided that the "[t]erms of the [divorce] decree may be enforced by all remedies available for enforcement including but not limited to contempt."[158] The court cited *State ex rel. Shaunki v. Endsley*,[159] which interpreted that statutory provision to mean that certain aspects of the dissolution decree may be enforced by contempt, but that an order compelling the payment of money may not[160] because contempt cannot be used to enforce a money judgment.[161] Applying the *Shaunki* rule, the court reversed the trial court's judgment.[162]

6. *Non-Nuptial Agreements.*—The most significant case in the area of marriage and dissolution did not, in actuality, involve either marriage or dissolution of marriage. In *Glasgo v. Glasgo*,[163] facts similar to those in the much-publicized *Marvin v. Marvin*[164] case confronted the Indiana Court of Appeals. Jane and Laurel Glasgo, parents of two children, were divorced in 1967. In 1973, they began living together again. During the next five years, the family built and furnished a new home. Although he told her that everything he

---

[152]*Id.*

[153]405 N.E.2d at 45 n.2. *See also* Wagoner v. Wagoner, 147 Ind. App. 696, 263 N.E.2d 657 (1970).

[154]412 N.E.2d 319 (Ind. Ct. App. 1980).

[155]The alimony judgment was contained in a separation agreement between the parties which had been incorporated into the dissolution decree as provided for in IND. CODE § 31-1-11.5-10(b) (1976). 412 N.E.2d at 320.

[156]412 N.E.2d at 320.

[157]*Id.*

[158]IND. CODE § 31-1-11.5-17(a) (Supp. 1981).

[159]266 Ind. 267, 362 N.E.2d 153 (1977).

[160]*Id.* at 269, 362 N.E.2d at 154.

[161]*See* 412 N.E.2d at 320 n.1.

[162]*Id.* at 321.

[163]410 N.E.2d at 1325 (Ind. Ct. App. 1980).

[164]18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

had was hers,[165] Laurel subsequently refused to marry Jane. After she and the children moved out of the home again,[166] Jane brought an action for half of the value of the property acquired by the family during the period of cohabitation.[167] Out of a net estate valued at $28,952.90, the trial court awarded Jane $6,062.03 plus a hutch, or $8,062.03 in the alternative if Laurel received the hutch. Laurel appealed the decision arguing first that claims by non-married persons are against public policy in Indiana and second that there was insufficient evidence to support the judgment under principles of either implied contract or equity.[168]

Laurel Glasgo relied heavily on the rationale of the Illinois Supreme Court in *Hewitt v. Hewitt*.[169] The Illinois court held that a claim for property division where the parties were not married was contrary to public policy and would not be recognized.[170] In so holding, the Illinois Supreme Court overruled the Illinois Court of Appeals which had adopted the reasoning of *Marvin v. Marvin*.[171] In *Marvin*, the California Supreme Court held that, on contract theory, agreements between unmarried partners would be enforced "except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services."[172] The California court also said that, in the absence of an express contract, the court should "inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture"[173] and that it might also impose a constructive or resulting trust, if equity so required. The court in *Marvin* recognized changing mores and the increasing frequency of cohabitation. While explicitly affirming the importance of marriage, the California court refused to impose a moral standard "so widely abandoned by so many."[174]

The *Glasgo* court, while considering the policy questions[175] raised

---

[165]410 N.E.2d at 1326.

[166]Jane took with her the furniture and personal property she had brought into the relationship as well as a microwave oven, a sweeper, and a hutch built by Laurel and one of their sons which she had finished. *Id.*

[167]The property consisted of real estate, radio and airplane equipment, miscellaneous personal property, and a motorcycle. *Id.*

[168]*Id.* at 1327.

[169]77 Ill. 2d 49, 394 N.E.2d 1204 (1979).

[170]*Id.* at 66, 394 N.E.2d at 1211.

[171]18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

[172]*Id.* at 665, 557 P.2d at 110, 134 Cal. Rptr. at 819.

[173]*Id.*

[174]*Id.* at 683-84, 557 P.2d at 122, 134 Cal. Rptr. at 831.

[175]The questions include: whether recognition of legal rights arising out of non-marriage relationships would undermine the family; what rights children of such relationships would have; and whether recognition of such claims would, in effect, recreate

in *Hewitt*, declined to follow the Illinois Supreme Court's rationale. Noting that Indiana's abolition of the laws applying to common-law marriage.[176] had obviously not abolished cohabitation and acknowledged that Indiana courts and applied common-law principles to such claims even before the legal demise of the common-law marriage.[177] Therefore, the court found that Jane Glasgo's property claim was independent of the marriage and dissolution statutes and thus recognition of the claim would not reinstate common-law marriage in Indiana. The court refused to categorize the relationship as meretricious, largely because the Glasgos conducted themselves in the manner of a conventional American family.[178] Noting that "to deny recovery to one party in such a relationship is in essence to unjustly enrich the other,"[179] the court held that recovery could be based on either equitable or contractual grounds.[180] The court further held that, in view of the agreement between the parties, no presumption arose that the services of Jane Glasgo were gratuitous.[181]

Claims arising out of cohabitation relationships are increasingly being litigated throughout the nation.[182] If the conduct of two unrelated parties establishes either a contractual or equitable basis for recovery, the assertion of a claim should not give rise to any question of marital status, either legal or common-law. An interesting development which supports the view that contract or equity principles should apply is the action by many states to bring property claims arising out of non-marital relationships within the Statute of Frauds.[183] Such action increases the evidence required for recovery, but emphasizes the contractual nature of the claim. Application of the Statute of Frauds would encourage the parties to put their agreements in writing and would discourage fraudulent claims.

The *Glasgo* opinion is not clear, however, as to the basis for the amount awarded to Jane Glasgo. She did not receive half of the value of the joint property, so the division may have been based on a "quantum meruit" theory. Failure to specify the rationale for such

---

the common-law marriage specifically eliminated by statute. 410 N.E.2d at 1329 (quoting 77 Ill. 2d at 58-59, 394 N.E.2d at 1207-08).

[176]IND. CODE § 31-1-6-1 (1976).

[177]*See* Moslander v. Moslander's Estate, 110 Ind. App. 122, 38 N.E.2d 268 (1941).

[178]410 N.E.2d at 1330.

[179]*Id.*

[180]*Id.* at 1331.

[181]The court held that Laurel could not argue both ways: he could not assert, on the one hand, that Jane should not be presumed to be his wife while asserting, on the other hand, that she rendered her services gratuitously. *Id.* at 1332.

[182]*See, e.g.*, Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973); Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979); Latham v. Latham, 274 Or. 421, 547 P.2d 144 (1976).

[183][1980] 6 FAM. L. REP. (BNA) 2206, 2439.

a division leaves open the question of whether the claim was actually allowed on contractual, quasi-contractual or equitable grounds.[184]

E. Paternity

1. Change of Name.—A voluntary paternity proceeding raised a question of first impression in Indiana as to whether the trial court can change the child's surname over the objection of a parent during a proceeding to determine paternity.[185] The mother of an illegitimate child appealed the determination of the trial court that the child should bear his father's surname. In a split decision, the court of appeals held that the court's action "was neither contrary to law, against the evidence, nor an abuse of discretion."[186]

The majority opinion ostensibly applied the "best interests of the child" standard,[187] noting that the mother's embarrassment could not outweigh the interests of the child. The court held that the "best interests" test provided a rational basis for the trial court's finding that a name change was appropriate and, therefore, the change of surname was not an abuse of discretion.[188] The trial record contained a remark by the trial judge expressing his opposition to women's liberation.[189] The court found that while such an expression was neither appropriate nor relevant, it did not require that the judgment be set aside.[190]

The concurring judge agreed only with the holding that the appellate court could not substitute its discretion for that of the trial judge.[191] He concurred with the dissenting judge's contention that the factors advanced in the majority opinion "should be given

---

[184]The General Assembly enacted another significant piece of domestic relations legislation. IND. CODE § 35-42-2-1 (Supp. 1981) makes the second battery committed on a married person by their spouse a Class D felony. This explicit authorization should facilitate prosecution for repeated spouse abuse.

[185]D.R.S. v. R.S.H., 412 N.E.2d 1257 (Ind. Ct. App. 1980).

[186]*Id.* at 1259 (Buchanan, C.J.; Sullivan, J., concurring in the result and filing separate opinion; Shields, J., dissenting and filing opinion).

[187]*Id.* at 1263. The court of appeals determined that no statute in Indiana forbids a name change during a paternity proceeding before considering whether the change was in the best interest of the child. *Id.* at 1261.

The factors considered under this standard were: 1) the *father's* traditional interest in having his child bear his name; 2) *society's* interest in strengthening the father-child bond; 3) any misconduct on the father's part; 4) the preference (if any) of the child; and, 5) the inference of illegitimacy arising from the use of the mother's name.

[188]*Id.* at 1266.

[189]"Well, this women's lib thing just makes me furious and I will put it on the record." *Id.* at 1269 (Shields, J., dissenting).

[190]*Id.* at 1266-67 (Sullivan, J., concurring).

[191]*Id.* at 1266 (Sullivan, J., concurring).

limited, if any, significance in a determination to change a child's surname from that of the natural mother to that of the biological father."[192]

The dissenting judge, while agreeing that the trial court had the authority to order a name change in the child's best interest, found an abuse of discretion in this case.[193] The dissent noted that there was no evidence on the record that the paternal surname would prove a financial asset to the child or increase his social standing in the community.[194] In addition, "a child bearing a different name from the mother is as likely, [as a child bearing the mother's name] if not more so, to raise inquiry as to the circumstances resulting in the discrepancy."[195] The dissent also indicated that the court should consider the child's preference, as well as the wrong-doing of either parent, but that it should not consider either the selfish interest of the parents or their monetary obligation because both parents have an obligation to support the child.[196] The dissenting judge further stated that the determination of the child's best interests was clearly biased by the trial judge's own prejudices, as expressed on the record.

The majority opinion, while applying the "best interest of the child" standard, heavily emphasized the father's interests.[197] The dissenting judge found that the mother's testimony was the only evidence on the record as to the child's best interest,[198] while the majority opinion did not discuss any evidence on the record.

2. *Determination of Paternity in Conjunction with Other Proceedings.—Sandoval v. Hammersly*[199] required the court of appeals to consider the determination of paternity during an adoption proceeding. The putative father filed a petition to establish paternity which was dismissed.[200] While his appeal was pending, the circuit court granted a petition for the child's adoption. The appeal from the adoption proceeding was consolidated with the appeal of the dis-

---

[192]*Id.*

[193]*Id.* at 1267-69 (Shields, J., dissenting).

[194]*Id.* at 1268 (Shields, J., dissenting).

[195]*Id.*

[196]*Id.* at 1268 (Shields, J., dissenting). *See* IND. CODE § 31-4-1-2 (1976) (repealed 1978) and § 31-6-6.1-13 (Supp. 1981) (current statute requiring parents to support their children).

[197]412 N.E.2d at 1263.

[198]*Id.* at 1268.

[199]419 N.E.2d 813 (Ind. Ct. App. 1981).

[200]*Id.* at 814. The petition was dismissed for failure to timely file under IND. CODE § 31-4-1-26 (1976) (repealed 1978). The *Sandoval* court held that this statute, even when in effect, dealt with the enforcement of a support obligation, not determination of paternity and that the differing burden of proof in the two actions made the statute inapplicable. 419 N.E.2d at 815 n.4.

missal of the paternity petition.[201] The major issue raised on appeal was whether the trial court erred in not making a specific finding with regard to paternity on the grounds that the father's rights in the adoption proceeding depended on the determination of paternity.[202] The court of appeals held that such a finding was indeed essential "in order to render a just decision in the adoption."[203]

The issue of paternity was material in *Sandoval* because if Sandoval were found to be the father, his consent to the adoption would have to be obtained[204] or his parental rights terminated before the adoption could be completed.[205] The appellate court ordered the trial court to make a specific finding of fact regarding paternity because "a missing finding upon a material issue cannot be resolved by any presumption."[206]

The dissenting judge,[207] noting that Indiana Code section 31-3-1-6 provided that the father's consent was not required unless paternity had been determined by a court proceeding, argued that the trial court's finding that "the minor child . . . was born out of wedlock and [that the] child's paternity was never established"[208] was a specific finding of fact which could be overturned only if clearly erroneous.[209] Thus, there was sufficient evidence to sustain the trial court's finding.[210]

It is unclear whether the statement that "the child's paternity was never established" was a specific finding of fact with respect to paternity. As the dissenting judge stated, the father had the burden of proof in the paternity determination, so "[t]he trial court's finding that paternity was never established was a negative judgment against Sandoval."[211] However, the finding could refer to the dismissal of the paternity action. In that situation, the finding would be invalid because the dismissal was improper.

Another case in which the court determined paternity as part of

---

[201]419 N.E.2d at 815.

[202]*Id.*

[203]*Id.*

[204]*See* IND. CODE § 31-3-1-6(a) (Supp. 1981) which provides that written consent of the mother and the father of an illegitimate child must be obtained before an adoption petition may be granted, and *id.* § 31-3-1-6(g) which states that consent to adoption is not required of a father whose paternity has not been established by court proceeding.

[205]IND. CODE § 31-3-1-7 (1976) (repealed 1978).

[206]419 N.E.2d at 816.

[207]*Id.* at 816-17 (Hoffman, J., dissenting).

[208]*Id.* at 815.

[209]*Id.* at 817. *See* IND. R. CIV. P. 52(A). The dissenting judge cited both the mother's statement that the child's father was unknown and Sandoval's failure to voluntarily establish paternity as he had with two prior children. 419 N.E.2d at 817.

[210]419 N.E.2d at 817.

[211]*Id.*

another proceeding was *Dorsey v. Dorsey*.[212] During a dissolution proceeding, the trial court declared the husband to be the father of a child born before the marriage because the husband, as well as the wife, acknowledged that the husband was the father. On appeal, the wife argued that the court lacked jurisdiction to determine pater nity and had abused its discretion in doing so.[213]

The appellate court affirmed the trial court action, holding that "[o]nce the court became aware that there was a child of the parties, it had a duty to provide for custody, support and visitation pursuant to the dissolution statutes. This could only be done, however, after a determination of paternity had been made."[214] The court, relying on the precedent of *Toller v. Toller*,[215] held that the trial court did not abuse its discretion in determining paternity.[216]

---

[212]409 N.E.2d 1233 (Ind. Ct. App. 1980). *See* note 97 *supra* and accompanying text for a discussion of the facts of this case.

[213]*Id.* at 1234.

[214]*Id.*

[215]375 N.E.2d 263 (Ind. Ct. App. 1978).

[216]409 N.E.2d at 1234-35. Had there been a genuine issue with respect to paternity, the court would not have had jurisdiction because the dissolution proceedings were in the Hendricks County Superior Court and jurisdiction over paternity proceedings rested in the Hendricks Circuit Court.

IX. Evidence

HENRY C. KARLSON*

A. *Hearsay*

1. Patterson *Limited.*—A limitation upon the *Patterson* rule[1] permitting prior statements of witnesses available for cross-examination to be used as substantive evidence is the product of a convicted robber's appeal in *Carter v. State.*[2] The appellant in *Carter* objected to a witness' relating the contents of an extrajudicial statement prior to its declarant's appearance as a witness. Although ruling that the error was harmless due to the witness' subsequent testimony, the court of appeals held that the appellant's objection was correct.[3]

In reaching this determination, the court created foundational requirements for the substantive use of out-of-court statements under the *Patterson* rule. The foundation has two parts. The declarant must be confronted with the statement while on the witness stand, and he must admit or deny making it.[4] If the declarant denies making the statement or denies present recollection of the statement, the statement if merely oral may not be used as substantive

---

*Associate Professor of Law, Indiana University School of Law—Indianapolis. J.D. (Honors), University of Illinois, 1968.

[1]In Patterson v. State, 263 Ind. 55, 324 N.E.2d 482 (1975), the Indiana Supreme Court permitted two extrajudicial statements to be used as substantive evidence. One statement was admitted after the defendant confronted a prosecution witness with parts of a prior statement seeking to impeach her. Thereafter, the court permitted the prosecution to introduce the entire written statement. Even if the entire statement were not substantive evidence, the prosecution would have been permitted to introduce excerpts of the statement referred to by the defense so as to rebut any inference that her present testimony was inconsistent with her prior statement. *See* Carroll v. State, 263 Ind. 696, 338 N.E.2d 264 (1975) (entire portions of deposition may be read into record if part is used); FED. R. EVID. 106. The second statement was offered by the prosecution as a prior inconsistent statement to impeach its own witness, who was the wife of the accused. Assuming that the prosecution had shown a proper foundation for impeaching its own witness, her prior statement was admissible for purposes of impeachment. Teague v. State, 269 Ind. 103, 379 N.E.2d 418 (1978); Rogers v. State, 262 Ind. 315, 315 N.E.2d 707 (1974); IND. CODE § 34-1-14-15 (1976). *See generally* M. SEIDMAN, THE LAW OF EVIDENCE IN INDIANA 33 (1977). Although the holding in *Patterson* only indicated that limiting instructions were not necessary, it has been interpreted to permit the use of all extrajudicial statements as substantive evidence. *See* Stone v. State, 268 Ind. 672, 377 N.E.2d 1372 (1978); Flewallen v. State, 267 Ind. 90, 368 N.E.2d 239 (1977); Lamar v. State, 266 Ind. 689, 366 N.E.2d 652 (1977); Carter v. State, 266 Ind. 196, 361 N.E.2d 1208, *cert. denied*, 434 U.S. 866 (1977).

[2]412 N.E.2d 825 (Ind. Ct. App. 1980).

[3]*Id.* at 828.

[4]*Id.* at 827-28.

evidence.[5] A statement in writing or that was electronically recorded is admissible even if the declarant denies or fails to remember making it.[6]

Insofar as the court in *Carter* required that a declarant be confronted with an extrajudicial statement prior to its use as substantive evidence, it created a foundation similar to, but not the same as, that necessary for the use of a prior inconsistent statement for impeachment of a witness. Indiana law has long required that in order to impeach a witness by evidence of a prior statement, the witness must be confronted with it while on the witness stand.[7] To permit the substantive use of an extrajudical statement with less foundation than required for it to be used for impeachment serves no purpose. The court's requirement that the declarant admit making the statement if it were oral and unrecorded, however, creates the danger that important evidence will be lost through perjury.[8]

The opinion in *Carter* found support for this requirement in the *Patterson* decision wherein it is stated, "The out-of-court asserters . . . were upon the witness stand at the time their out-of-court assertions were offered. Neither denied giving the statements attributed to her, nor did they profess ignorance of such statements."[9] However, if this were meant to be a requirement for substantive use of out-of-court statements, it would apply to prior written or recorded statements as well as those which were merely oral in nature. Both of

---

[5]*Id.* at 829-30 n.4. The statement if inconsistent could still be used for impeachment. IND. CODE § 34-1-15-1 (1976) provides in part that:

> [w]hen a witness, whether a party to the record or not, is cross-examined to lay foundation for his impeachment by proof of an act or statement inconsistent with his testimony, and is asked if he did not do the act or make the statement, and he answers that he does not recollect having done the act or made the statement, the party thus laying the foundation for impeachment shall have the right to introduce evidence of the act or statement in the same manner as if the witness had answered that he had not done the act or made the statement.

[6]412 N.E.2d at 829-30 n.5.

[7]The foundation for impeachment of a witness by evidence of a prior inconsistent statement requires that the witness be confronted with the substance of the statement and told the date, place and person to whom it was made. Carroll v. State, 263 Ind. 696, 338 N.E.2d 264 (1975); Gradison v. State, 260 Ind. 688, 300 N.E.2d 67 (1973); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 37, at 72-75 (2d ed. E. Cleary 1972); M. SEIDMAN, THE LAW OF EVIDENCE IN INDIANA 34 (1977).

[8]The Indiana Supreme Court has recognized that one purpose of the *Patterson* rule is to prevent loss of evidence due to a turncoat witness. In commenting on the use of the *Patterson* rule in Stone v. State, 268 Ind. 672, 377 N.E.2d 1372 (1978), the court wrote, "Here, the prosecution was faced with a 'turncoat witness' and the potential loss of major evidence of guilt, and therefore there was no misapplication of the rule in this case." *Id.* at 678-79, 377 N.E.2d at 1375.

[9]263 Ind. at 58, 324 N.E.2d at 484-85, *quoted in* Carter v. State, 412 N.E.2d at 829.

the statements in the *Patterson* decision were prior written statements.[10] If the court intended the segment cited in the *Carter* opinion to create foundational requirements for the use of prior out-of-court statements as substantive evidence, it must have meant for the foundation to apply to the written statements which were the subject of its opinion. This position was rejected in *Carter*[11]

The *Patterson* rule does not require that a declarant acknowledge making a statement in order for it to be used as substantive evidence. It merely requires that the declarant be subject to cross-examination concerning the statement. As stated in the *Patterson* decision, "We note, however, that in all three versions of the federal rules, the availability of the declarant for cross-examination is required. *It is our judgment that this safeguard is of paramount importance and is adequate.*"[12] The court of appeals in *Carter* created a requirement not found in *Patterson* when it required the declarant of a prior unrecorded oral statement to acknowledge its making prior to its use as substantive evidence.

The concern of the court of appeals that the admission of extrajudicial statements which are denied or unrecalled may constitute a violation of the confrontation clause of the sixth amendment[13] is not shared by the United States Supreme Court. As a basis for its concern, the court cited a number of law review articles[14] that rely upon the United States Supreme Court decision in *California v. Green.*[15] The issue dealt with in *Green,*[16] however, is not that of a witness who denies or fails to recall making a statement. It dealt with a witness who claims a loss of memory concerning the event that is the subject of the statement.[17] The sixth amendment right of confrontation as it relates to use of a statement which the declarant denies making is dealt with by the United States Supreme Court in *Nelson v. O'Neil,*[18] a case decided after *California v. Green.*

In *Nelson* the question before the court was whether or not the

---

[10]263 Ind. at 57, 324 N.E.2d at 484.

[11]412 N.E.2d at 831-40 n.4.

[12]263 Ind. at 58, 324 N.E.2d at 485 (emphasis added).

[13]412 N.E.2d at 831-40 n.4.

[14]Beaver & Biggs, *Attending Witnesses' Prior Declarations as Evidence: Theory v. Reality*, 3 IND. L.F. 309 (1970); Bein, *Prior Inconsistent Statements: The Hearsay Rule, 801(d)(1)(A) and 803(24)*, 26 U.C.L.A. L. REV. 967 (1979); Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A. L. REV. 43 (1954); Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151 (1978); Reutlinger, *Prior Inconsistent Statements: Presently Inconsistent Doctrine*, 26 HASTINGS L.J. 361 (1974).

[15]412 N.E.2d at 829-30 n.4.

[16]399 U.S. 149 (1970).

[17]*Id.*

[18]402 U.S. 622 (1971).

respondent's sixth amendment right of confrontation was violated when his co-defendant's unrecorded oral prior statement implicating him was received in evidence.[19] His co-defendant, Runnels, had taken the witness stand and denied making the oral statement as well as the truth of the statement. As stated by the court the issue was whether or not "cross-examination can be full and effective where the declarant is present at trial, takes the witness stand, testifies fully as to his activities during the period described in his alleged out-of-court statement, but denies that he made the statement and claims that its substance is false."[20] The court in *Nelson* held that the respondent had not been denied his right of confrontation. Cross-examination of Runnels could not have been more effective than his voluntary testimony denying the out-of-court statement. The re spondent, held the court, would have been in a less favorable position had his co-defendant admitted making the statement but denied its truth.[21]

Similarly, an accused who has an extrajudicial statement used against him as substantive evidence under the *Patterson* rule is not denied full and effective cross-examination merely because the declarant of the statement denies making it. His position is not more favorable if the declarant admits making the statement. That part of the *Carter* opinion that would prohibit the substantive use of oral extrajudicial statements that the declarant does not acknowledge making should be rejected by the Indiana Supreme Court.[22]

2. Nonassertive Conduct.—Watt v. State[23] indicates that conduct which is not meant to be an assertion will be treated differently in Indiana courts than in federal courts. Nonassertive conduct is hearsay, according to *Watt*, if it is offered to prove a belief or thought on the part of the actor which is impliedly asserted by the

---

[19]*Id.*

[20]*Id.* at 627.

[21]Had Runnels in this case "affirmed the statement as his," the respondent would certainly have been in far worse straits than those in which he found himself when Runnels testified as he did. . . . To be sure, Runnels might have "affirmed the statement" but denied its truthfulness, claiming, for example, that it had been coerced, or made as part of a plea bargain. But cross-examination . . . would have been futile in that event as well.

Id. at 628-29.

[22]The Indiana Supreme Court has previously permitted a statement to be used as substantive evidence even though the declarant denied memory of the statement. In Stone v. State, 268 Ind. 672, 377 N.E.2d 1372 (1978), the court held it proper to use as substantive evidence the record of a guilty plea proceeding in which a witness had pled guilty to second degree murder, even though the witness testified he did remember telling the court during the plea proceeding the facts making him guilty of second degree murder.

[23]412 N.E.2d 90 (Ind. Ct. App. 1980).

conduct. The court in *Watt* states that "[c]onduct as hearsay involves an implied assertion by the out-of-court asserter. . . . It means that the conduct that is the result of a *thought* is being used as proof of the matter impliedly asserted."[24] In contrast to this holding, Federal Rule of Evidence 801 excludes from the definition of hearsay conduct that is not meant to be an assertion.[25]

The question of whether or not conduct that is not meant to be an assertion should be considered hearsay was first discussed in the English case of *Wright v. Doe d. Tatham*.[26] In the words of the English opinion, "the proof of a particular fact, which is not itself a matter in issue, but which is relevant only as implying a statement or opinion of a third person on the matter in issue, is inadmissible in all cases where such a statement or opinion not on oath would be of itself inadmissible . . . ."[27] American courts that have considered the question at first followed this English precedent, however, the current trend is to admit nonassertive conduct.[28] Until the decision in *Watt*, Indiana courts had not directly considered the issue.[29]

In contrast to court decisions, the Federal Rules of Evidence exclude nonassertive conduct from the definition of hearsay. The reason for this exclusion is amply explained in the Advisory Committee's Note to Federal Rule of Evidence 801:

> Whether nonverbal conduct should be regarded as a statement for purposes of defining hearsay requires further consideration. Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement. Other verbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred. This sequence is, arguably, properly includable within the hearsay concept. . . . Admittedly, evidence of this character is untested with respect to the perception, memory and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in

---

[24]*Id.* at 96 (citations omitted).

[25]FED. R. EVID. 801(a) provides that a "Statement" is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." Under this definition, nonassertive conduct is not a statement for purposes of the hearsay rule.

[26]112 Eng. Rep. 488 (Exch. Ch. 1837).

[27]*Id.* at 516-17.

[28]C. MCCORMICK, *supra* note 7, § 250, at 598.

[29]*But see* Romey v. Glass, 120 Ind. App. 279, 91 N.E.2d 850 (1950); Griffith v. Thrall, 109 Ind. App. 141, 29 N.E.2d 345 (1940).

> the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. Motivation, the nature of the conduct, and the presence or absence of reliance will bear heavily upon the weight to be given the evidence."[30]

The position taken by the drafters of the Federal Rules of Evidence is one that has been accepted by the drafters of other codes of evidence.[31]

The Indiana Court of Appeals in *Watt* has adopted a position which creates an unnecessary conflict with the rule in federal courts. It is clear that evidence which will be rejected as hearsay in future Indiana cases in conformity with *Watt* would be admitted in federal courts. This may lead parties to select a forum for their civil actions based upon considerations of evidence admissibility. It will serve to increase forum shopping and may make the outcome depend upon the fortuity of federal jurisdiction. Absent strong policy interests in maintaining a specific rule of evidence, rules of evidence in both state and federal courts should be similar. When the state rule is in conflict with the position adopted by modern evidence codes, the federal rules should be adopted.

B. Best Evidence Rule

An objection to testimony on the theory that it violated the best evidence rule was properly overruled by the Indiana Supreme Court in *Jackson v. State*.[32] The appellant in *Jackson* was convicted of murder committed while in the perpetration of a robbery. His conviction rested in part upon the testimony of a witness who operated the video-tape equipment used to record his confession. During examination by the prosecution, he was asked to demonstrate the manner in which the defendant, during the confession, had demonstrated

---

[30]P. ROTHSTEIN, FEDERAL RULES OF EVIDENCE 351 (Student ed. 1979).

[31]The following states have adopted FED. R. EVID. 801(a): Alaska, Arizona, Arkansas, Delaware, Florida, Hawaii, Maine, Minnesota, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, Washington, Wisconsin and Wyoming. Colorado has in effect adopted the rule. However, its rule substitutes "to be communicative" for "as an assertion." *See* FED. EVID. REP., STATE CORRELATION TABLES. California's Evidence Code also excludes nonassertive conduct from operation of the hearsay rule. CAL. EVID. CODE §3225, at 1200 (West). UNIFORM RULES OF EVIDENCE 801(a) (1974 revision) is the same as FED. R. EVID. 801(a).

[32]411 N.E.2d 609 (Ind. 1980).

firing the murder weapon.[33] The defendant objected to this request and contended that best evidence of what was sought to be proved was the video-tape.[34] His objection was properly overruled.[35]

The best evidence rule does not apply merely because the subject matter of a witness' testimony is also contained in a document, recording, or photograph. Testimony is properly excludable under the best evidence rule only when it seeks to prove the contents.[36] In *Jackson* the witness was not seeking to prove the contents of the video-tape, he was merely describing an event he had personally observed. As noted by the supreme court:

> [r]ather, he testified as to things he had personally seen and heard. In other words, Captain Wleklinski was not asked to reveal the contents of the video-tape, he was asked to relate what he had personally seen the defendant demonstrate at the time of the confession. Because of this, the "best evidence" rule is not applicable.[37]

The court also held that any appeal based upon a violation of the best evidence rule must include some indication that the appellant disputes the accuracy of the evidence received concerning the contents of the writing.[38] It cites as authority for this holding *Sanders v. State*,[39] wherein the court wrote:

> "That purpose [of the best evidence/original writing rules] is to secure the most reliable information as to the contents of documents, when those terms are disputed. A mystical idea of seeking the 'best evidence' or the 'original document' as an end in itself is no longer the goal. Consequently when an attack is made, on motion for new trial or an appeal, upon the judge's admission of secondary evidence,

---

[33]*Id.* at 611.

[34]Indiana has applied the best evidence rule only to writings. Howard v. State, 264 Ind. 275, 342 N.E.2d 604 (1976); Pinkerton v. State, 258 Ind. 610, 283 N.E.2d 376 (1972). FED. R. EVID. 1002, however, applies the best evidence rule to proof of the contents of recordings and photographs as well as writings.

[35]411 N.E.2d at 611.

[36]C. MCCORMICK, *supra* note 7, § 233, at 563-65. *See* Meyers v. United States, 171 F.2d 800 (D.C. Cir. 1948), *cert. denied*, 336 U.S. 912 (1949); Elkins v. State, 250 Ala. 672, 35 So. 2d 693 (1948); People v. Sweeney, 55 Cal. 2d 27, 9 Cal. Rptr. 793, 357 P.2d 1049 (1960); Hill v. State, 201 Ga. 300, 39 S.E.2d 675 (1946); People v. Spencer, 264 Ill. 124, 106 N.E. 219 (1914); Sanders v. State, 237 Miss. 772, 115 So. 2d 145 (1959); People v. Giro, 19 N.Y. 152, 90 N.E. 432 (1910); Commonwealth v. Lennon, 124 Pa. Super. Ct. 47, 188 A. 84 (1936); McDaniel v. Commonwealth, 183 Va. 481, 32 S.E.2d 667 (1945).

[37]411 N.E.2d at 611 (citations omitted).

[38]*Id.* at 612.

[39]264 Ind. 688, 348 N.E.2d 642 (1976).

> it seems that the reviewing tribunal should ordinarily make inquiry of the complaining counsel, 'Does the party whom you represent actually dispute the accuracy of the evidence received as to the material terms of the writing?' If counsel cannot assure the court that such good faith dispute exists, it seems clear that any departure from the regulations in respect to secondary evidence must be classified as harmless error."[40]

Thus the court determined that even if the best evidence rule applied to the testimony, any error was harmless because there was no dispute as to its accuracy.[41]

Although no court opinion other than *Sanders* is cited in support of a requirement for an actual dispute concerning the accuracy of secondary evidence before a violation of the best evidence rule will be other than harmless error, the requirement is a reasonable one.[42] To provide that violation of the best evidence rule created reversible error even if the secondary evidence used was accurate would be to elevate form over substance. A similar analysis led the drafters of Federal Rule of Evidence 1003 to permit use of a duplicate unless there was some proper reason for its exclusion.[43]

C. *Impeachment*

The propriety of cross-examination aimed at disclosing an intimate relationship between a prosecution witness and the undercover police officer involved in an arrest was discussed in *Harrington v. State*.[44] The appellant in *Harrington* was convicted of dealing in a

---

[40]*Id.* at 691, 348 N.E.2d at 644 (quoting C. McCormick, *supra* note 7, § 243).

[41]411 N.E.2d at 612.

[42]*See* C. McCormick, *supra* note 7, § 243, at 577-78. *But see* National Fire Ins. Co. v. Evertson, 153 Neb. 854, 46 N.W.2d 489 (1959). In *Evertson*, the court reversed partly on the ground that a carbon copy was used to prove the terms of a written settlement, despite the fact that it was shown on appeal that the carbon copy and the original were exactly the same.

[43]Fed. R. Evid. 1003 provides: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Indiana has in effect adopted this rule. McDonough v. State, 242 Ind. 376, 175 N.E.2d 418 (1961); Wilson v. State, 169 Ind. App. 297, 348 N.E.2d 90 (1976). The Advisory Committee Note to Fed. R. Evid. 1003 states that

> [w]hen the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy and genuineness. By definition, in Rule 1001(4), *supra*, a 'duplicate' possesses this character.

[44]413 N.E.2d 622 (Ind. Ct. App. 1980), *transfer denied*, March 26, 1981.

controlled substance.[45] His conviction rested in part upon the testimony of an informant. During the trial, the appellant sought to cross-examine the informant concerning an intimate relationship between the informant and the undercover police officer.[46] The trial court prohibited this line of questioning.

On appeal, the conviction was overturned due to an erroneous instruction on entrapment,[47] and the court of appeals sought to give some guidance to the trial court concerning admission of evidence relating to the relationship at the re-trial. The relationship between the informant and the police officer would not be admissible to impeach her general moral character,[48] however, it might be admissible as evidence of bias.[49] The feelings of a witness concerning another witness are a proper subject for cross-examination.[50] However, the court cites with approval the statement of the United States Seventh Circuit Court of Appeals that "[w]e do not find that a sexual relationship will per se give rise to bias, either favorable or unfavorable."[51] The quotation, from *United States v. Harris*,[52] is taken out of context.

In *Harris* the sexual relationship which the defendant sought to prove was "that she was and has been continuously a prostitute . . . and she has at one time or another sold herself to almost everybody she had testified with regard to . . . . "[53] Although the business relationship between a prostitute and her customers may not give rise

---

[45]*Id.*

[46]*Id.* at 626.

[47]*Id.*

[48]*Id.* A witness' general moral character may not be impeached by evidence of specific acts other than convictions for treason, murder, rape, arson, burglary, robbery, kidnapping, forgery, or willful and corrupt perjury as well as crimes involving dishonesty or false statement. Ashton v. Anderson, 258 Ind. 51, 279 N.E.2d 210 (1972). *See also* Fletcher v. State, 264 Ind. 132, 340 N.E.2d 771 (1976); Adams v. State, 366 N.E.2d 692 (Ind. Ct. App. 1977).

[49]Credibility of a witness may always be impeached by evidence of bias, interest, or prejudice on the part of the witness. Hall v. State, 267 Ind. 512, 371 N.E.2d 700 (1978); Haeger v. State, 390 N.E.2d 239 (Ind. Ct. App. 1979); Hunter v. State, 360 N.E.2d 588 (Ind. Ct. App. 1977), *cert. denied*, 434 U.S. 906 (1977). *See also* C. McCormick, *supra* note 7, § 40, at 78-81; E. Morgan, Basic Problems of State and Federal Evidence 70 (5th ed. J. Weinstein 1976); M. Seidman, *supra* note 7, at 43-44 (1977). This may be done on cross-examination by specific questions calling the act or statement showing bias to the attention of the witness. Taylor v. State, 249 Ind. 238, 241, 231 N.E.2d 507, 508 (1967). If the witness denies the act or statement showing bias, he may be contradicted by extrinsic evidence. Hunter v. State, 267 Ind. 512, 371 N.E.2d 700 (1978).

[50]*See* Pickett v. Kolb, 250 Ind. 449, 451, 237 N.E.2d 105, 107 (1968).

[51]413 N.E.2d at 626 (citing United States v. Harris, 542 F.2d 1283, 1302 (7th Cir. 1976)).

[52]542 F.2d 1283 (7th Cir. 1976).

[53]*Id.*

to any bias, the emotional involvement of a nonbusiness intimate relationship is evidence of which the trier of fact should be aware to properly evaluate a witness' credibility.[54]

For this purpose a police officer should not be considered a nonparty. A police officer who apprehends a person has both a professional and personal interest in his conviction. If the person is not convicted the police officer may face a suit for false arrest and a conviction may increase his chances for promotion. The exclusionary rule, which rejects evidence obtained through police misconduct,[55] is based, at least in part, upon the rationale that a police officer may be punished by denying him a conviction.[56] An intimate relationship between a witness and a party is generally admissible to show bias.[57] The intimate relationship between a prosecution witness and the undercover police officer involved in the case should also be admissible. Evidence of this nature creates a reasonable degree of probability that the witness is biased[58] unless as in *Harris* the relationship is sexual but is not intimate.

D. Competency

In *Cherry v. State*,[59] the Indiana Supreme Court approved a prosecuting attorney's acting in the dual role of lawyer and witness. Defense counsel in *Cherry* cross-examined the victim of the appellant's alleged rape concerning the description she gave police of her assailant as a thin man with either brown or reddish-brown hair. At the time of trial appellant was not thin, and had either dark brown or black hair.[60] To rebut the inference of misidentification created by cross-examination, the state called two deputy prosecutors who had observed the appellant at a prior trial.[61]

---

[54]*See* McFarland v. United States, 174 F.2d 538 (D.C. Cir. 1949); State v. Vidalez, 89 Ariz. 215, 360 P.2d 224 (1961); People v. Sweeney, 55 Cal. 2d 27, 357 P.2d 1049 (1960); Perdue v. State, 126 Ga. 112, 54 S.E. 820 (1906); Holly v. Commonwealth, 18 Ky. 441, 36 S.W. 532 (1896); State v. Johnson, 48 La. Ann. 437, 19 So. 476 (1896); State v. Cole, 213 S.W. 110 (Mo. 1919); Rasnake v. Commonwealth, 135 Va. 677, 115 S.E. 543 (1923); Porath v. State, 90 Wis. 527, 63 N.W. 1061 (1895). *But see* Adkinson v. State, 48 Fla. 1, 37 So. 522 (1904); People v. Goodrich, 251 Ill. 558, 96 N.E. 542 (1911).

[55]*See* Mapp v. Ohio, 367 U.S. 643 (1961).

[56]The primary purpose of the exclusionary rule is to deter unlawful police conduct. *See* United States v. Janis, 428 U.S. 433 (1976); Stone v. Powell, 428 U.S. 465 (1976). Inherent in the rule therefore must be the belief that police are punished when they are denied a conviction.

[57]*See* 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 949, at 784-92 (Chadbourn rev. 1970).

[58]*See* cases cited note 54 *supra*.

[59]414 N.E.2d 301 (Ind. 1981).

[60]*Id.* at 306.

[61]*Id.*

Both witnesses testified that the appellant's appearance had changed substantially. He had gained weight following treatment for severe thyroid and heart conditions. One deputy prosecutor also testified that appellant formerly had reddish hair.[62] Their testimony was critical to the proper identification of the appellant. Although it does not appear that the two deputy prosecutors were acting in that capacity at the trial, their testimony does raise some ethical problems.

The Code of Professional Responsibility provides in DR 5-501(B):

> A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify . . . .
>
> (4) as any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.[63]

The issue to be resolved in light of DR 5-501(B) is whether or not the same considerations that apply to private law firms should control a prosecutor's office.[64] Unlike the members of a private law firm, an attorney employed by the state has no monetary stake in the outcome of a trial.[65] It must also be considered that disqualifying

---

[62]*Id.* at 307.

[63]A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B) should be read in relation to DR 5-102(A) which provides:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

[64]Although not cited in *Cherry*, substantially the same question was before the court in State *ex rel.* Goldsmith v. Superior Court, 386 N.E.2d 942 (Ind. 1979). The specific question in *Goldsmith* was whether or not the entire prosecutor's office should have been disqualified from the trial of a case when one member of the office was a witness in the case. The court held that the entire office was not disqualified. *Id.* at 945.

[65]In *Goldsmith*, the court wrote:

> The lawyers in a law firm have a common financial interest in the case whereas the deputies in a prosecutor's office have an independent duty by law to represent the State of Indiana in criminal matters. Their relationship to each other, rather than pecuniary, is no more than sharing the same statutory duties; and the interest of one deputy which requires him to testify will ordinarily have no financial or personal impact on the other deputies in the office.

Id. at 945.

all members of a prosecutor's office may work a substantial hardship on the state, which is the prosecutor's client. The supreme court in *Cherry* was correct in its holding that the trial judge did not abuse his discretion in permitting the testimony of the deputy prosecutors.

E. Informant's Privilege

A defendant's need to depose a material witness must yield to the state's privilege to withhold the identity of a confidential informant[66] according to *Silva v. State*.[67] Defendant in *Silva* was convicted of two counts of dealing in marijuana in excess of thirty grams. Evidence introduced at trial showed that the informant, known to the defendant as Mick Smith, had observed one of the alleged sales and had been the only other witness to the negotiations leading to the second alleged sale.[68] A motion to quash the deposition of the informant was granted by the trial court.[69]

The appellate court found that:

> the defendant has not demonstrated how the deposition, and thus the disclosure, of the informant would have been relevant or helpful to the defense or essential to the fairness of the trial, since the role of the informant in the entire incident was to introduce the undercover officer to the defendant.[70]

Because the burden is upon a defendant to justify an exception to the general policy that prevents disclosure of an informant's identity,[71] the court in *Silva* held that the motion to quash the deposition was properly granted.[72] The opinion in *Silva* puts an impossible burden on the defendant.

Circumstances surrounding the two alleged sales were relevant

---

[66]What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

Roviaro v. United States, 353 U.S. 53, 59 (1957) (citations omitted).

[67]410 N.E.2d 1342 (Ind. Ct. App. 1980), *transfer denied*, April 22, 1981.

[68]*Id.* at 1344.

[69]*Id.* at 1344-45.

[70]*Id.* at 1345.

[71]*See* United States v. Alvarez, 472 F.2d 111 (9th Cir. 1973), *cert. denied*, 412 U.S. 921; Lewandowski v. State, 389 N.E.2d 706 (Ind. 1979); Gill v. State, 11 Md. App. 593, 275 A.2d 505 (1971); Oregon v. Cortman, 251 Or. 566, 446 P.2d 681 (1968) (on rehearing), *cert. denied*, 394 U.S. 951 (1969).

[72]410 N.E.2d at 1345.

to defendant's claim of entrapment.[73] The only evidence used by the prosecution to prove defendant's predisposition to sell marijuana was the description of circumstances surrounding the sales.[74] Mick Smith, the informant, was in a position to have personal knowledge of the facts used to determine guilt.[75] A stronger showing of relevance is not possible, as the defendant is not able to predict what the informant would say under oath. A defendant need not shoulder the impossible burden of showing in advance that an informant's testimony would be favorable.[76]

A procedure that should be adopted by Indiana courts for determining whether or not an informant's identity should be disclosed is that contained in proposed Federal Rule of Evidence 510(c)(2).[77] This rule would provide that when it appears that an informant may be able to give testimony necessary for a fair determination of guilt or innocence, the judge should give the government an opportunity to show *in camera* that there is not a reasonable probability the informer can give the testimony. The determination would ordinarily be made on the basis of affidavits. A procedure of this nature ensures that an informant's identity will not be unnecessarily disclosed and that a defendant will not be denied a critical witness due to the government's claim of privilege.[78]

---

[73]IND. CODE § 35-41-3-9 (Supp. 1981) provides:

(a) It is a defense that:

(1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and

(2) the person was not predisposed to commit the offense.

(b) conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

[74]410 N.E.2d at 1345.

[75]See "Statement of the Facts," *id.* at 1344.

[76]*See* Price v. Superior Court of San Diego County, 1 Cal. 3d 836, 463 P.2d 721, 83 Cal. Rptr. 369 (1970). A defendant need show only a reasonable possibility that the informer has personal knowledge of facts concerning the merits of the case. *See* People v. Kelly, 49 Cal. App. 3d 214, 122 Cal. Rptr. 393 (1975) *vacated on other grounds*, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976).

[77]*See* J. WEINSTEIN, FEDERAL RULES OF EVIDENCE ¶ 510(01), at 510-11 (1981). This rule, which was not adopted, states:

> *Testimony on merits.* If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary for a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the government is a party, and the government invokes the privilege, the judge shall give the government an opportunity to show *in camera* facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits.

Id.

[78]A procedure similar to that proposed by FED. R. EVID. 510(c)(2) has been adopted by some federal courts. *See* United States v. Howell, 514 F.2d 710 (5th Cir.

F. Opening the Door

The use of unconvicted acts of misconduct to dispell a false or misleading impression created by direct examination was upheld in *Haynes v. State*.[79] Extraneous acts of misconduct that have not been reduced to a conviction are generally inadmissible on the issue of guilt or innocence and may not be used to impeach the credibility of a witness.[80] Even acts of misconduct which have resulted in convictions are not admissible for purposes of impeachment unless the convictions are for crimes of an infamous nature or involve dishonesty or false statement.[81] However, these rules do not prevent presentation of evidence necessary to rebut a false impression created by direct examination.[82]

The appellant's wife in *Haynes* testified concerning police conduct when she and appellant were stopped by police for allegedly driving with defective brake lights. Although no criminal charges resulted from the incident, the appellant was searched, both were taken to the police station for interrogation, and the wife was offered a breathalyzer test.[83] On cross-examination the prosecutor was, over defense objection, permitted to ask, " 'And, Mrs. Haynes, was it not a fact that there were five pounds of marijuana in your car at the time?' "[84]

On appeal, the appellant raised two allegations of error based on this question. The appellant first claimed that the question interjected extraneous acts of misconduct into the case.[85] This claim was properly rejected by the court of appeals. As stated by the appellant on appeal, his wife's testimony concerning the incident was of-

---

1975) (defendant and defense counsel both excluded from the hearing); United States v. Anderson, 509 F.2d 724 (9th Cir.), *cert. denied*, 420 U.S. 910 (1975) (defense counsel but not defendant permitted at hearing). The procedure has been upheld by federal courts against confrontation and due process challenges. United States v. Doe, 525 F.2d 878 (5th Cir. 1976); United States v. Rawlinson, 487 F.2d 5 (9th Cir. 1973).

[79]411 N.E.2d 659 (Ind. Ct. App. 1980).

[80]*See* Chambers v. State, 392 N.E.2d 1156 (Ind. 1979); Swan v. State, 268 Ind. 317, 375 N.E.2d 198 (1978); Otto v. State, 398 N.E.2d 716 (Ind. Ct. App. 1980), *transfer denied*, June 3, 1980. *But see* Niemeyer v. McCarty, 221 Ind. 668, 51 N.E.2d 365 (1943). *See also* Karlson, *Evidence, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 359, 362-64 (1981).

[81]*See* note 48 *supra*.

[82]Gilliam v. State, 383 N.E.2d 297 (Ind. 1978); Baker v. State, 267 Ind. 646, 372 N.E.2d 1172 (1978); Pearish v. State, 264 Ind. 339, 344 N.E.2d 296 (1976); Martin v. State, 261 Ind. 492, 306 N.E.2d 93 (1973); Roby v. State, 173 Ind. App. 280, 363 N.E.2d 1039 (1977); McDonald v. State, 163 Ind. App. 667, 325 N.E.2d 862 (1975).

[83]411 N.E.2d at 663.

[84]*Id.*

[85]*Id.*

fered to show "that his wife and he were subjected to continuous police harassment and to bolster his contention that the police, through Sergeant Emmons, fabricated the marijuana charge for which he was being prosecuted."[86] His wife's direct examination did create the impression police subjected both to unusually severe treatment for a minor moving vehicle violation.

Where direct examination tells an incomplete story and thereby creates a false impression, otherwise inadmissible evidence may be used to complete the story and rebut the impression.[87] As stated by the court in *Haynes*, "[i]f this testimony left a false or misleading impression in the jurors' minds, then the prosecutor should have attempted to establish on cross-examination what actually precipitated the actions of the police. The prosecutor was free to refute this picture of harrassment painted by Mrs. Haynes on direct examination."[88] In *Gilliam v. State*,[89] the Indiana Supreme Court held that in order for testimony to open the door for evidence of otherwise inadmissible acts of misconduct it must leave the trier of fact with a false or misleading impression of the facts related.[90] Mrs. Haynes' direct examination met this test.

The appellant's second claim of error raises the issue of the basis an attorney must have for asking a question designed to impeach a witness on a collateral matter.[91] The court held that if a witness denies a question on cross-examination designed to impeach him on a collateral matter, the attorney must be prepared to dispute the denial of the question.[92] It cites Justice Jackson in *Michelson v. United States*,[93] that a prosecutor may not "ask a groundless question to waft an unwarranted inuendo [sic] into the jury box."[94] Counsel must, under this standard, have a reasonable basis for asking the question.[95] In *Haynes*, the court held that the prosecutor had,

---

[86]*Id.* at 664.

[87]*See* note 82 *supra*.

[88]411 N.E.2d at 664-65.

[89]383 N.E.2d 297 (Ind. 1978). For further discussion of this case, see Karlson, *Evidence, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 257, 276-278 (1980).

[90]383 N.E.2d at 301.

[91]411 N.E.2d at 665.

[92]*Id.* (citing Marsh v. State, 387 N.E.2d 1346, 1348 (Ind. Ct. App. 1979), *reversed on other grounds*, 393 N.E.2d 757 (Ind. 1979)).

[93]335 U.S. 469 (1948).

[94]411 N.E.2d at 665 (quoting Michelson v. United States, 335 U.S. 469, 481 (1948)).

[95]The Indiana Supreme Court has written that "[a]n attorney should not contrive a cross-examination based on fictitious assumptions when to do so would only confuse the fact finder and impede the search for truth." Lowe v. State, 260 Ind. 610, 613, 298 N.E.2d 421, 423 (1973), *quoted in* 411 N.E.2d at 665.

reasonable cause to believe marijuana was found in appellant's vehicle during the incident in question.[96]

G. Opinion Testimony

1. Expert Witness Defined.—When is an expert not an expert witness was the issue decided by the Indiana Supreme Court in *McCall v. State*.[97] The defendant in *McCall* gave notice of his intent to present an insanity defense but refused to cooperate with two psychiatrists appointed by the court to examine him. As a sanction for this refusal, the trial court excluded testimony of a marriage counselor called by the defendant to give an opinion on defendant's sanity.[98] After voir dire examination, the trial judge concluded that the counselor, who held numerous academic degrees and had extensive schooling in psychology and psychiatry, was an expert witness.[99] Adopting the New York holding in *Lee v. County Court of Erie County*,[100] the trial judge held that the proper sanction for the defendant's refusal to cooperate with the court's expert witnesses was to bar testimony by the defendant's expert.[101] On appeal a bare majority of the supreme court rejected *Lee*[102] and also determined that *Lee* was improperly applied because the marriage counselor was not called to testify as an expert.[103]

The majority found the distinction between a lay and an expert witness, at least upon an issue of sanity, to lie in the foundation required to render the opinion admissible. The lay witness' testimony is admissible because of his particular experience with the person. An expert witness' testimony is admissible because of his special-

---

[96]411 N.E.2d at 665. The record revealed that Mr. Hayne's attorney stated that the February 20 incident "involves something else and no arrest took place, but the car was searched and something was found." *Id.* at 665. The court also assumed that the prosecutor had access to police reports which specified the nature and quantity of the contraband found in the appellant's vehicle. *Id.*

[97]408 N.E.2d 1218 (Ind. 1980).

[98]*Id.* at 1219.

[99]*Id.* at 1219-20.

[100]27 N.Y.2d 432, 267 N.E.2d 452, 318 N.Y.S.2d 705 (1971), *cert. denied*, 404 U.S. 823 (1971). *Lee* held that when a defendant refuses to cooperate with court appointed psychiatrists he is foreclosed from presenting expert testimony on the issue of insanity. Some federal courts would also bar lay testimony on the issue of insanity when a defendant refuses to cooperate with court appointed experts. *See* United States v. Malcolm, 475 F.2d 420 (9th Cir. 1973); United States v. Jacquillon, 469 F.2d 380 (5th Cir. 1972); United States v. Baird, 414 F.2d 700 (2nd Cir. 1969); United States v. Albright, 388 F.2d 719 (4th Cir. 1968).

[101]408 N.E.2d at 1219-20.

[102]*Id.* at 1220.

[103]*Id.* at 1221-23.

[104]*Id.*

ized knowledge of the subject of insanity. As the marriage counselor had been dealing with the defendant in a professional capacity for a long period of time, the majority opinion held that he was a lay witness because his testimony concerning the defendant's sanity was based upon personal observation of the defendant for purposes other than for preparation for trial.[104]

The majority opinion is incorrect in its determination that the defendant's witness was not called as an expert. It is well settled that an expert may base his testimony upon personal observation as well as facts made known to him at trial.[105] The true distinction between a lay and expert witness must take into consideration not only the basis of the testimony but also its content. An offer of proof made by the defendant indicated that the witness would, based on his observation of the defendant over a period of years, testify that the defendant was not able to discern right from wrong and could not conform his conduct to the law.[106] This testimony goes far beyond prior cases which have permitted lay witnesses to give a general opinion on a person's sanity.[107] The better rule would be to limit the use of specific opinions dealing with the legal standard for sanity in criminal cases to expert witnesses.

The majority opinion is also incorrect in its statement that:

> Expert witnesses are witnesses injected into a case, because of their expertise in a given field, either to assist the jury in understanding some technical subject not ordinarily within the ken of a lay person or to express an opinion, often hypothetically, upon a disputed issue, following a proper foundation, both as to his knowledge of the subject matter involved and the specifics of the particular case. *Expert opinions are manufactured expressly for trial.*[108]

The most effective expert opinions are not manufactured expressly for trial. They are created for use or treatment and testified to at trial.[109]

---

[105]*See* Fischer v. State, 160 Ind. App. 641, 312 N.E.2d 904 (1974); Mutual Life Ins. Co. v. Jay, 112 Ind. App. 383, 44 N.E.2d 1020 (1942); *See also* FED. R. EVID. 703; C. MCCORMICK, *supra* note 7, § 14, at 31-34.

[108]408 N.E.2d at 1225 (Pivarnik, J., dissenting).

[107]*See* Lynn v. State, 392 N.E.2d 449 (Ind. 1979); Washington v. State, 390 N.E.2d 983 (Ind. 1979); Blake v. State, 390 N.E.2d 158 (Ind. 1979); Baum v. State, 264 Ind. 421, 345 N.E.2d 831 (1976).

[108]408 N.E.2d at 1221-22 (emphasis added).

[109]A manufactured expert witness lacks the credibility of a witness whom the defendant relied upon for treatment. Professor Jeans in his handbook on trial advocacy states:

The next step is to establish the expert's relation to the case. In many in-

2. *Basis of Expert Testimony.*—The appeal from a decision of the Industrial Board gave the court of appeals in *Duncan v. George Moser Leather Co.*[110] an opportunity to examine use of hearsay reports by expert witnesses. At his hearing before the Industrial Board, the appellant sought to introduce testimony from a rehabilitation counselor employed by the Indiana State Rehabilitation Services. The counselor's testimony was, in part, based upon reports from two physicians concerning their previous treatment of the appellant.[111] He did not have knowledge of the procedures used, the tests given, or the conclusions drawn by the physicians. The witness admitted that he had no expertise to verify the reliability or accuracy of the reports.[112]

In determining that his testimony insofar as it was based on hearsay medical reports was properly excluded, the court of appeals held that Indiana law imposes a three-part test to determine if an expert opinion is admissible when it is based on a report that is either not in evidence or inadmissible as substantive evidence due to the hearsay rule.

> In order for the opinion to be admissible (1) the expert must have sufficient expertise to evaluate the reliability and accuracy of the report, (2) the report must be of a type normally found reliable, and, (3) the report must be of a type customarily relied upon by the expert in the practice of his profession or expertise.[113]

Applying this test to the testimony of the appellant's expert witness, the court correctly determined that insofar as it was based on hearsay reports, it was properly excluded.[114]

Although the opinion of an expert witness may properly be based upon hearsay reports,[115] it may not be based upon reports whose re-

---

> stances he will be a 'manufactured witness' who has been brought into the case at the instance of lawyers for specific litigation purposes and paid by them for such services. If this is the case it is advisable to disclose such facts to the jury at the outset. They will hear about them at some time and if left to cross-examination *the whole relationship might be depicted as unfair and sinister.*

J. JEANS, TRIAL ADVOCACY §12.13, at 283 (1975) (emphasis added).

[110]408 N.E.2d 1332 (Ind. Ct. App. 1980).

[111]*Id.* at 1342.

[112]*Id.* at 1343.

[113]*Id.*

[114]*Id.* at 1343-44.

[115]*See* United States v. Bohle, 445 F.2d 54 (7th Cir. 1971); Morris v. State, 266 Ind. 473, 364 N.E.2d 132 (1977), *cert. denied*, 434 U.S. 972 (1978); Smith v. State, 259 Ind. 187, 285 N.E.2d 275 (1972), *cert. denied*, 409 U.S. 1129 (1973); Rosenbalm v. Winski, 165 Ind. App. 378, 332 N.E.2d 249 (1975); FED. R. EVID. 703; C. MCCORMICK, *supra* note 7, § 15, at 34-36.

liability and accuracy he is unable to determine. As noted by the Ninth Circuit in *United States v. Sims*,[116] "the admissibility of expert testimony based on hearsay is that the expert is fully capable of judging for himself what is, or is not, a reliable basis for his opinion."[117] When an expert is not able to determine the reliability of hearsay reports, his opinion may not be based upon them. If this were not the rule, the use of hearsay reports in criminal cases would violate a defendant's sixth amendment right to confrontation.[118]

---

[116]514 F.2d 147 (9th Cir.), *cert. denied*, 423 U.S. 845 (1975).

[117]514 F.2d at 149.

[118]U.S. CONST. amend. VI. *See* United States v. Williams, 447 F.2d 1285 (5th Cir. 1971), *cert. denied*, 405 U.S. 954 (1972).

X. Insurance

G. KENT FRANDSEN*

This past survey year revealed an increasing number of cases arising out of disputes regarding the interpretation of insurance policy provisions. Selected for comment are those cases involving noteworthy variations on the common themes of policy exclusions for losses "intentionally caused by the insured," the effect of "other insurance" clauses, the "uninsured motorist coverage" endorsement, "omnibus" clauses, and exclusions for damages resulting from breach of warranty of fitness, as well as a single case construing subrogation rights.

A. Exclusions for Intentional Acts

Most liability policies specifically exclude coverage for "damages caused by or at the direction of an insured."[1] In those policies which are silent on the subject, courts will generally read into them an implied exception that no coverage exists for a loss deliberately caused by an insured.[2] This exception recognizes the nature of insurance, which is intended to indemnify only those losses that are fortuitous.[3]

In *Indiana Lumbermens Mutual Insurance Co. v. Brandum*,[4] the insurer brought a declaratory judgment action to determine its liability for damages resulting from an automobile crash. In a fit of pique after seeing his fiancee riding with an acquaintance, the insured deliberately rammed the other vehicle several times causing it to veer off the road. The other automobile collided with a utility pole and came to rest upon a third vehicle that was parked along the roadside. The fiancee and the driver of the vehicle in which she was riding were both killed, and the occupants of the parked vehicle sustained bodily injuries. The trial court granted summary judgment in favor of the defendants on the theory that their injuries were not caused intentionally and therefore, did not fall within the scope of

---

*Associate Dean of Student Affairs, Associate Professor of Law, Indiana University School of Law—Indianapolis. B.S., Bradley University, 1950; J.D., Indiana University, 1965. The author extends appreciation to Merlin Whiteman for his assistance in the preparation of this article.

[1]*See* 7A J. APPLEMAN, INSURANCE LAW AND PRACTICE, § 4492.01 at 21 (Berdal ed. 1979) [hereinafter cited as APPLEMAN]. *See also* Wigginton v. Lumbermans Mut. Cas. Co., 169 So. 2d, 70 (La. 1964).

[2]*See generally*, R. KEETON, BASIC TEXT ON INSURANCE LAW 286-87 (1971) [hereinafter cited as KEETON].

[3]*Id.* at 288.

[4]419 N.E.2d 246 (Ind. Ct. App. 1981).

an exclusionary clause which provided: "Exclusions. This policy does not apply: . . . (b) to bodily injury or property damage caused intentionally by or at the direction of the insured."[5]

Lumbermens contended that it should not be responsible for its insured's defense nor liable for the resulting damages because (1) the exclusion applies to *all* damages caused by the insured's intentional acts or, in the alternative, the intent to cause the damages *should be inferred* from the circumstances;[6] (2) public policy precludes liability coverage for non-fortuitous losses;[7] and (3) the tort principle of transferred intent should apply to deny the insured liability coverage for damages caused by his intentional act even though there was no intent to injure that specific party.[8]

Relying principally upon *Home Insurance Co. v. Neilsen*,[9] the court of appeals rejected these arguments and held "that not only must an insured's acts have been intentional to preclude coverage, but the insured must also have intended to harm the party actually injured."[10] Additionally, the court stated that the insured's "actions were directed at individuals other than the appellees, and although . . . he should have been cognizant of danger to third parties, it is equally clear that the very nature of his acts was not such that harm to the appellees must have been intended."[11] The court's refusal to equate transferred intent with the contractual standard that permits the exclusion of coverage was tempered by its recognition that an exception exists when the insured's acts are so egregious that they raise the inference that the insured intended to harm anyone nearby.[12]

---

[5]*Id.* at 247.

[6]*Id.*

[7]*Id.*

[8]*Id.* at 248.

[9]165 Ind. App. 445, 332 N.E.2d 240 (1975). Neilsen sought a declaration that Home Insurance was required to defend him against a suit seeking damages resulting from his striking a third party allegedly in self-defense. The court of appeals, in reversing the trial court's finding of a duty to defend, stated that the exclusionary clause was susceptible of several interpretations. It adopted the view that the proper interpretation is that the policy excludes coverage for an intentional act of the insured which was intended to cause injury. *Id.* at 450-51, 332 N.E.2d at 244. "The latter intent may be established either by showing an actual intent to injure, or by showing the nature and character of the act to be such that intent to cause harm to the other party must be inferred as a matter of law." *Id.*

[10]419 N.E.2d at 248.

[11]*Id.*

[12]*Id.* The court distinguished a federal district court decision, relied on by Lumbermens, which held that an automobile policy did not provide coverage where the insured set off a dynamite charge in his car intending to kill his wife and himself, but also injuring third parties. *Id.* (citing Kraus v. Allstate Ins. Co, 258 F. Supp. 407 (W.D. Pa. 1966), *aff'd*, 379 F.2d 443 (3d Cir. 1967)). "[S]etting off dynamite in a crowded urban

In *Heshelman v. Nationwide Mutual Fire Insurance Co.*,[13] a case factually similar to *Home Insurance Co.*,[14] an insured sued his homeowner's policy insurance carrier for failure to defend him in a third-party lawsuit seeking damages for assault and battery. The altercation arose when the insured attempted to cross a picket line manned by striking union employees, including the third party. When the insurer refused to defend, the insured provided his own defense[15] and initiated a declaratory judgment action to determine the insurer's duty to provide a defense. Nationwide responded that there was no coverage under the policy and, further, they did not have a duty to defend because of a clause in the policy that excluded: " 'Bodily injury, illness or death or property damages caused intentionally by or at the direction of an insured.' "[16] The court of appeals agreed, holding that where pleadings and an investigation of the facts fail to disclose a claim within the coverage of the policy, or when coverage is clearly excluded, no duty to defend exists even if the suit is otherwise false, groundless or fraudulent.[17]

A determination of the insurer's obligation to defend based solely on the allegations of the complaint is open to criticism. Under modern practice, the complaint merely serves a notice function and is framed before discovery proceedings crystallize the facts of the case.[18] The test to determine the duty to defend should therefore focus upon the facts underlying the lawsuit rather than the allegations in the complaint.[19] Even if the complaint is proven, it may not determine the obligation of the insurer to pay the resulting judgment. Further,

---

area will of necessity injure bystanders raising the inference that the insured intended to harm anyone nearby." 419 N.E.2d at 248.

[13]412 N.E.2d 301 (Ind. Ct. App. 1981), *transfer denied*, March 24, 1981.

[14]For a brief discussion of this case see note 9 *supra*.

[15]Alleging self-defense, the insured counterclaimed against the third party and during the pendency of the declaratory judgment action prevailed on his counterclaim and the third party lost on his action. 412 N.E.2d at 302.

[16]*Id.*

[17]412 N.E.2d at 302 (citing 7C APPLEMAN, *supra* note 1, § 4685.01, at 124-27). *See generally* Annot., 2 A.L.R. 3d 1242 (1965).

[18]*See* Kepner v. Western Fire Ins. Co., 109 Ariz. 329, 331, 509 P.2d 222, 224 (1973). *See also* Texaco, Inc. v. Hartford Acc. & Indem. Co., 453 F. Supp. 1109 (E.D. Okla. 1978).

> [N]otwithstanding the general rule that the duty of an insurer to defend an action brought against its insured is to be determined from the allegations of the complaint . . . , it is also a general rule "that the obligation . . . to defend its insured is determined by the actual facts brought to the [insurer's] attention . . . rather than pertinent allegations contained in the complaint or petition of a complainant against the insured which are not true."

Id. at 1112 (quoting American Motorists Ins. Co. v. Southwestern Greyhound Lines, Inc., 283 F.2d 648, 649 (10th Cir. 1960)).

[19]109 Ariz. at 331, 509 P.2d at 224.

in actions involving damages caused by the defendant's intentional acts, there is a possibility that any judgment obtained would be covered by the indemnity provisions of the policy. For example, the injured party could amend his complaint to allege negligent conduct allowing the insured to assert a claim of self-defense.[20] The insurer is placed in peril if it refuses to defend based on facts not in the pleadings. If it is ultimately determined that a defense was required, the company must reimburse its insured for his costs of defense.[21] Because the wrongful refusal constitutes a breach of contract, the insurer is liable for all damages reasonably flowing from such breach.[22]

During the survey period, the court of appeals decided a third case that presented the issue of an insurer's duty to defend under a policy with an exclusionary clause for intentionally inflicted injuries. In *Snodgrass v. Baize*,[23] the court examined and approved the procedures employed by an insurer to fulfill its contractual duty to provide a defense while preserving its position to assert a coverage defense after the determination of a third-party action.

Snodgrass involved a claim for personal injury arising out of a shooting which the plaintiff alleged, alternatively, was inflicted intentionally *or* negligently by the defendant's decedent. Prior to trial on the negligence action, counsel selected by the insurance company to represent its insured informed the insured's personal attorney that because of the potential conflict of interest,[24] he would seek authorization from the carrier to withdraw his appearance. The personal attorney would be allowed to conduct the defense for which the latter would be paid a reasonable fee by the insurance company.

---

[20]St. Paul Fire & Marine Ins. Co. v. Hodor, 200 So. 2d 205 (Fla. Dist. Ct. App. 1967). *See also* United States Fidelity & Guar. Co. v. Baugh, 146 Ind. App. 583, 257 N.E.2d 699 (1970). The holding of *United States Fidelity* was rejected by a federal district court in All-Star Ins. Corp. v. Steel Bar, Inc., 324 F. Supp. 160 (N.D. Ind. 1971). "[T]he use of language by the Appellate Court in its lengthy opinion is so confusing that it is not possible to tell what the Court intended by its opinion." *Id.* at 163.

[21]*See* Arenson v. National Auto. & Cas. Ins. Co., 48 Cal. 2d 528, 310 P.2d 961 (1957). "Having defaulted such agreement the company is manifestly bound to reimburse its insured for the full amount of any obligation reasonably incurred by him." *Id.* at 539, 310 P.2d at 968. *See also* Keitham v. Massachusetts Bonding & Ins. Co., 159 Conn. 128, 267 A.2d 660 (1970).

[22]*See, e.g.*, Southwestern Bell Tel. Co. v. Western Cas. & Sur. Co., 269 F. Supp. 315 (E.D. Mo. 1967), *modified*, 396 F.2d 351 (8th Cir. 1968); Kepner v. Western Fire Ins. Co., 109 Ariz. 329, 509 P.2d 222 (1973); Beck v. Kelly, 323 So. 2d 667 (Fla. Dist. Ct. App. 1975).

[23]405 N.E.2d 48 (Ind. Ct. App. 1980).

[24]*Id.* at 52. *See* ABA Code of Professional Responsibility, EC 5-17; *cf.* American Employers Ins. Co. v. Goble Aircraft Specialties, 205 Misc. 1066, 131 N.Y.S.2d 393 (Sup. Ct. 1954) (an attorney may not represent both the insurance carrier and the insured).

It was further understood and agreed to by the personal attorney that the carrier would be allowed to defend against any claim under proceedings supplemental or execution procedures, and that it would litigate the question of whether the plaintiff was injured as a result of intentional *or* negligent conduct. After the jury returned a verdict for the plaintiff on the negligence count, a motion for proceedings supplemental was filed against the judgment defendant and the insurer. The company argued that the injury was " 'expected or intended from the standpoint of the insured' " and was therefore excluded from coverage.[25] The trial court accepted the insurance company's argument.

On appeal, the judgment holder argued that in proceedings supplemental the carrier should be bound by the jury verdict under doctrines of res judicata, collateral estoppel, or equitable estoppel.[26] Noting that res judicata is divided into two parts, "claim preclusion" and "collateral estoppel,"[27] the court rejected the application of either doctrine.[28] With respect to "claim preclusion," the court stated that while the two proceedings involved the same facts, the respective claims were not the same.[29] The original civil action involved a claim seeking damages for the insured's tortious conduct and the instant proceeding was "a claim to obtain an asset in the hands of a third party to satisfy the judgment rendered upon the first claim."[30]

The court acknowledged that the doctrine of "collateral estoppel" was "facially applicable" because the insurer is deemed in privity with its insured.[31] Yet, because there was a partial conflict of interest between the indemnitee and indemnitor,[32] and because the insurer could not control the defense of its insured, "collateral estoppel" did not apply. As a New Jersey court stated in *Burd v. Sussex Mutual Insurance Co.*,[33]

> [w]henever the carrier's position so diverges from the insured's that the carrier cannot defend the action with com-

---

[25]405 N.E.2d at 51.

[26]*Id.*

[27]*Id.* at 51. *See also* State v. Speidel, 392 N.E.2d 1172 (Ind. Ct. App. 1979).

[28]405 N.E.2d at 51-53.

[29]*Id.* at 51.

[30]*Id.*

[31]*Id. See, e.g.*, Cowan v. Ins. Co. of N. America, 22 Ill. App. 3d 883, 318 N.E.2d 315 (1974); Hoosier Cas. Co. v. Miers, 217 Ind. 400, 27 N.E.2d 342 (1940).

[32]"The insured would benefit, to the extent of policy limits, from a finding of negligence which arguably was within the coverage of the policy. The insurer would favor a finding of an intentional tort which the policy did not cover." 405 N.E.2d at 51. *See also* Farm Bureau Mut. Auto. Ins. Co. v. Hammer, 177 F.2d 793 (4th Cir. 1949), *cert. denied*, 339 U.S. 914 (1950).

[33]56 N.J. 383, 267 A.2d 7 (1970).

> plete fidelity to the insured, there must be a proceeding in which the carrier and the insured, represented by counsel of their own choice, may fight out their differences. That action may, as here, follow the trial of the third party's suit against the insured.[34]

The judgment holder also argued that because the carrier had not given him a notice of disclaimer or reservation of rights, it should have been equitably estopped from asserting a coverage defense.[35] The court held that Indiana only requires that such notice be given to the insured to preserve any coverage defenses.[36] Additionally, the court noted that estoppel arguments are generally raised in cases where the insurer has defended the insured. In the instant case the carrier, by paying the judgment debtor's personal attorney, fulfilled its duty to defend but did not control the defense of the civil action.[37]

B. Cumulative Coverage Clauses

Virtually all insurance policies, other than those on life, contain "other insurance" clauses.[38] Historically these clauses were included in fire and personal property insurance policies to protect the insurer against the moral risks incident to over-insurance.[39] Their inclusion in modern automobile liability policies, however, has been solely to reduce or limit the liability of the insurer in the event of concurrent coverage of the same risk by another insurer.[40]

Courts throughout this country have been deluged with litigation arising over conflicting "other insurance" clauses. Most of these courts have adopted the so-called "majority rule," as enunciated in *Zurich General Accident & Liability Insurance Co. v. Clamor*.[41] This rule requires that a court reconcile this conflict by first determining which of the "other insurance" provisions is the more specific in its

---

[34]*Id.* at 391, 267 A.2d at 11.

[35]405 N.E.2d at 53 (citing State Farm Mut. Auto. Ins. Co. v. Phillips, 210 Ind. 561, 2 N.E.2d 989 (1936)).

[36]405 N.E.2d at 53.

[37]*Id.*

[38]*See* Werley v. United Servs. Auto. Ass'n, 498 P.2d 112 (Alaska 1972). "[A]utomobile liability insurance policies [generally] contain 'other insurance' clauses providing that in the event of other *applicable* insurance, (1) this insurance shall not apply (an 'escape' clause), or (2) that this insurance shall be excess only (an 'excess' clause), or (3) there shall be a proration of the loss (a 'proration' clause)." *Id.* at 116 (emphasis in original); *See also* Note, *Concurrent Coverage in Automobile Liability Insurance*, 65 COLUM. L. REV. 319 (1965).

[39]*See* KEETON, *supra* note 2, at 168.

[40]*Id. See also* Note, *supra* note 38.

[41]124 F.2d 717, 720 (7th Cir. 1942). *See also* Annot., 76 A.L.R.2d 502 (1961).

restriction, and then give effect to the specific over the general clause.[42] Thus, a policy containing a general escape clause will yield to one containing a specific excess clause, and generally the former policy must bear all liability.[43]

The Indiana Supreme Court in *Indiana Insurance Co. v. American Underwriters, Inc.*,[44] rejected the "majority rule" and held that whenever these clauses conflict, they are to be disregarded "and each insurer is liable for a prorated amount of the resultant damage not to exceed his policy limits."[45] Notwithstanding this clear pronouncement, insurers have endeavored to persuade Indiana courts that the holding of *Indiana Insurance Co.* is inapplicable when carriers are disputing allocation *among themselves* of a loss incurred by an insured who had coverage afforded by two policies. They argue that the court should give effect to the express intent of the parties as contained in the respective policies when determining the apportionment of a loss among insurers.

Indiana Insurance Co. v. Federated Mutual Insurance Co.,[46] was a declaratory judgment action seeking a determination of each insurer's respective liability for a $100,000 settlement with a motorcyclist who was struck by a truck being test-driven by the defendant. The defendant had a comprehensive liability policy issued by Federated with $100,000/$300,000 bodily injury limits. The owner of the truck was insured under a comprehensive liability and garage insurance policy issued by Indiana Insurance with identical limits. Both policies contained "other insurance" clauses. Federated's coverage included non-owned vehicles and was available as excess insurance. The Indiana Insurance policy purported to escape liability if a garage customer had "other valid and collectible insurance, whether primary, excess or contingent, . . . [with] limits . . . sufficient to pay damages up to the amount of the applicable [statutory] financial responsibility limit . . . . "[47]

Indiana Insurance argued that it was not liable under its policy because the defendant was a garage customer, as defined in its

---

[42]124 F.2d at 720.

[43]The basis for those jurisdictions using the "majority rule" to reconcile conflicting "other insurance" clauses by construing the policy language is the "general contract doctrine encouraging parties to contract freely without fear of judicial interference." Indiana Ins. Co. v. Federated Mut. Ins. Co., 415 N.E.2d 80, 84 (Ind. Ct. App. 1981). *See also* Watson, *The "Other Insurance" Dilemma*, 54 ILL. B.J. 486 (1966).

[44]261 Ind. 401, 304 N.E.2d 783 (1973), *discussed in* Frandsen, *Insurance, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 217, 224-26 (1974).

[45]261 Ind. at 407, 304 N.E.2d at 787.

[46]415 N.E.2d 80 (Ind. Ct. App. 1981).

[47]*Id.* at 82. In Indiana these limitations are $15,000 per person/$30,000 per occurrence. IND. CODE § 9-2-1-15 (1976).

escape clause, and that Federated's coverage was sufficient to pay damages up to the Indiana statutory limit.[48] Federated, however, contended that because the defendant was driving a non-owned vehicle, its coverage should be treated as "'excess insurance over any other valid and collectible insurance available to the insured.'"[49] Therefore Indiana Insurance was either primarily liable for the whole settlement or, if the clauses were mutually repugnant, each carrier bore primary liability and each should pay one-half of the $100,000 settlement.[50]

The trial court properly ruled that the two clauses were mutually repugnant and should be disregarded *in toto*, and held each insurer liable for one-half of the $100,000 settlement. The court of appeals, relying principally upon the earlier *Indiana Insurance Co.* decision, affirmed in an informed discussion of why the proration method should be used when apportioning a loss among concurrent carriers.[51] Indiana Insurance argued that although the clauses of two policies may be found mutually repugnant for liability purposes, "they can still be used to deduce the intent of the insurer to limit the amount or extent of its liability."[52] The court acknowledged that it would have addressed the issue of lower liability limits for garage customers had Indiana Insurance conspicuously inserted such a limit in its policy; "[i]nstead, its purported limitation is buried in and is an intricate part of its escape clause provision."[53] Regrettably, the court's suggestion is likely to encourage the continuing battle of draftsmanship.

The fervor with which insurers seek to avoid being designated as primary carrier is exceeded only by their opposition to judicial apportionment of the loss by disregarding policy language and rewriting the contract. "Generally the allocation of liability between insurers is determined by contract, and where such contractual provisions are not inconsistent with public policy, they will be enforced."[54]

---

[48]415 N.E.2d at 83.

[49]*Id.* at 81.

[50]*Id.* at 82.

[51]*Id.* at 83-86 (citing Indiana Ins. Co. v. American Underwriters, Inc., 261 Ind. 401, 304 N.E.2d 783 (1973)).

[52]415 N.E.2d at 88.

[53]*Id.*

[54]8A APPLEMAN, *supra* note 1, § 4907.65 at 365, 367. *See* Pacific Indem. Co. v. Liberty Mut. Ins. Co., 269 Cal. App. 2d 793, 799, 75 Cal. Rptr. 559, 565 (1969) (the intention of the principals is the critical factor in allocating primacy of coverage between duplicate insurers); *but see* Miller v. National Farmers Union Property & Cas. Co., 470 F.2d 700, 706 (8th Cir. 1972) (Minnesota cases declaring that equitable principles govern in solving conflicting, overlapping insurance escape or excess clauses are inapplicable where both policies are primary and there are no conflicting escape or excess clauses). *See also* Rossmoor Sanitation, Inc. v. Pylon, Inc., 40 Cal. App. 3d 417, 115 Cal.

United Services Automobile Association v. American Interinsurance Exchange[55] involved another dispute among two liability carriers regarding the proper interpretation of their respective "other insurance" clauses. *A*, while operating an automobile owned by *B*, collided with a vehicle owned and operated by *C*. *C* brought suit against both *A* and *B* for personal injuries sustained in the collision. *A* was insured under a family automobile policy issued by United Services Automobile Association (United Services) with liability limits of $100,000 per person. *B* was insured under a policy issued by American Interinsurance Exchange (Interinsurance) with policy liability limits of $15,000 per person. Under the terms of the Interinsurance policy, *A* was insured as a non-owner driver. Prior to trial, *C* settled his personal injury action for $7,500. Each insurer's share of the settlement was determined by prorating the loss in accordance with the respective policy limits. United Services and Interinsurance reserved the right to contest their respective liability based upon the terms of the policies. United Services brought the instant action against Interinsurance seeking a declaratory judgment of its liability on the underlying claim. The trial court found against United Services on the basis that the "other insurance" clauses were conflicting and mutually repugnant, thus the loss was to be prorated according to each insurer's liability limits.

Based on *Federated Mutual Insurance Co.*,[56] the court of appeals affirmed. Rejecting United Services' argument that to impose a prorata contribution would make it liable for a greater share of the loss " 'solely by reason of [its] higher policy limits,' "[57] the court held "that proration of the loss . . . is the correct method for apportioning the loss in this State."[58]

Rptr. 91 (1974), *vacated*, 13 Cal.3d 622, 532 P.2d 97, 119 Cal. Rptr. 449 (1975). In *Rossmoor Sanitation*, the court of appeals stated that "[w]here dual coverage is provided [by two insurers] for the same risk, public policy plays a minor role in the determination of which coverage is primary, for to the public it makes little difference which of two insurers is ultimately held responsible for a particular loss." 115 Cal. Rptr. at 97.

[55]416 N.E.2d 875 (Ind. Ct. App. 1981), *transfer denied*, July 14, 1981.

[56]*See* notes 46-54 *supra* and accompanying text.

[57]416 N.E.2d at 879.

[58]*Id.* The supreme court adopted the proration rule in Indiana Ins. Co. v. American Underwriters, Inc., 261 Ind. 401, 304 N.E.2d 783 (1973).

> " 'It [proration] does not arbitrarily pick one of the conflicting clauses and give effect to it; it does not deprive the insured of any coverage; it is not prejudicial in giving a windfall to one insurer at the expense of another; it does not encourage litigation between insurers; it does not delay settlements. On the other hand, it does enable underwriters to predict the losses of the insurers more accurately; it does preclude the use of illogical rules developed by the courts (e.g., first in time, specific v. general and primary tort-feasor doctrines); and it does give a basis for uniformity of result. In addition, pro-

Midwest Mutual Insurance Co. v. Indiana Insurance Co.,[59] also concerned "other insurance" clauses, and suggests that insurers are routinely suing each other in order to either require or disclaim participation in the risk-taking process. Midwest issued a motorcycle policy which afforded uninsured motorist coverage (UMC) for the named insured and her relatives. Midewest paid $3,000 in full satisfaction of a claim arising out of a collision with a hit and run motorist, and brought a declaratory judgment action to compel contribution from Indiana Insurance who had issued a policy, also including UMC, covering another vehicle owned by the named insured.

It is generally stated that "[w]here two or more companies fully insure the same risk and one company is compelled to pay the total loss, it is entitled to contribution from the others for the amount of their proportionate shares."[60] In its attempt to avoid this liability, Indiana Insurance argued first that its policy, containing uninsured motorist coverage, was not available to the insured because of an exclusion in the UMC that provided:

> Exclusion. This policy does not apply under Part IV;
> (a) to bodily injury to an insured while occupying an automobile (other than an insured automobile) owned by the named insured or a relative, or through being struck by such automobile.

In disposing of this argument, the court noted that words in an insurance policy should be given their popular and ordinary meaning.[61] The son was riding a motorcycle; he was not occupying an automobile. "Had Indiana intended to exclude motorcycles owned by the insured but not insured with the company, it could have and should have chosen to use the words 'motor vehicle' in the exclusion."[62]

Indiana Insurance also argued that even if its policy covered the accident, the coverage was to be "excess" insurance to that available under Midwest Mutual's policy and because the claim was set-

---

rating the loss among all insurers is a rule that can be applied regardless of the number of insurers involved and regardless of the type of conflicts that are created by the "other insurance" clauses.' "

Id. at 408-09, 304 N.E.2d at 788 (quoting Werley v. United Servs. Auto Ass'n, 498 P.2d 112, 119 (Alaska 1972)).

[59]412 N.E.2d 84 (Ind. Ct. App. 1980).

[60]8A APPLEMAN, *supra* note 1, § 4921, at 513. *See, e.g.*, Commercial Cas. Ins. Co. v. Hartford Acc. & Indem. Co., 190 Minn. 528, 253 N.W. 888 (1934) (per curiam); Continental Cas. Co. v. St. Paul Mercury Fire & Marine Ins. Co., 163 F. Supp. 325 (S.D. Fla. 1958), wherein the court held that even though neither policy contains a proration clause, an insurer may compel contribution where both cover the same risk. *Id.* at 327.

[61]412 N.E.2d at 87. *See, e.g.*, Spears v. Jackson, 398 N.E.2d 718, 719 (Ind. Ct. App. 1980); Thompson v. Genis Building Corp., 394 N.E.2d 242, 244 (Ind. Ct. App. 1979); Physicians Mut. Ins. Co. v. Savage, 156 Ind. App. 283, 286, 296 N.E.2d 165, 167 (1973).

[62]412 N.E.2d at 87.

tled within that policy's limits, Indiana Insurance was not liable. Examining the "other insurance" provision in Indiana Insurance's policy, the court observed that it classified "other insurance" into two categories:

> While the insured is occupying an *automobile* not owned by the named insured, any Indiana insurance is deemed excess. In all other circumstances, Indiana shall be liable pro rata. In the situation at bar, the vehicle was not an automobile. Therefore, the very language of the policy dictates pro rata coverage.[63]

Finally, Indiana Insurance argued that by paying $3,000 in full satisfaction of the loss, Midwest Mutual became a volunteer and was not therefore entitled to contribution.[64] The court of appeals properly allowed Midwest to obtain a prorated contribution from Indiana, and on policy considerations held that payment by an insurer which performs its contractual obligations does not render it a volunteer.[65]

C. *Uninsured Motorist Coverage*

In *Indiana Farmers Mutual Insurance Co. v. Speer*,[66] the wife of the named insured under an Indiana Farmers' policy was killed in a collision with an allegedly uninsured motorist while she was driving a vehicle owned by her son who resided at home. The son's car was not insured by Indiana Farmers. Unlike in most automobile policies,[67]

---

[63]*Id.* (emphasis in original).

[64]8A APPLEMAN, *supra* note 1, § 4921, at 534.

> If an insurer voluntarily pays more than its share of the loss . . . some decisions had held it to be unable to demand contribution. Thus, if a policy contains a coinsurance clause limiting the insurer's liability to its pro rata share of the loss, an insurer paying the full amount of a loss has been held in early cases to be a mere volunteer as to the excess, and not entitled to contribution from the insurer which denied liability.

Id. See, e.g., Employers Cas. Co. v. Transport Ins. Co., 444 S.W.2d 606 (Tex. 1969); Farm Bureau Mut. Auto. Ins. Co. v. Buckeye Union Cas. Co., 147 Ohio St. 79, 67 N.E.2d 906 (1946).

[65]412 N.E.2d at 89. These policy considerations included encouraging quick claim settlements by insurers and preventing unnecessary litigation that would result if the insured covered under two policies were forced to institute legal action to determine the liability of the two insurers. *Id.* (citing St. Paul Fire & Marine Ins. Co. v. All-State Ins. Co., 25 Ariz. App. 309, 312, 543 P.2d 147, 150 (1975)).

[66]407 N.E.2d 255 (Ind. Ct. App. 1980), *transfer denied*, Mar. 27, 1981.

[67]Typically, "Persons Insured" under the liability coverage of an automobile policy include: "(a) with respect to the owned automobile, (1) the named insured and any resident of the same household, . . ." KEETON, *supra* note 2, at 662. Under the definitions section of such policies a " 'named insured' means the individual named in Item I of the declarations and also includes his spouse, if a resident of the same household." *Id.*

the wife was not defined as a "named" or "additional" insured under the liability coverage provisions of Indiana Farmers' policy issued to the husband on another vehicle.[68] The husband contended that the wife was entitled to the benefits of that policy's uninsured motorist coverage (UMC) provisions.[69] The insurer responded that the Indiana UMC statute[70] does not require it to provide coverage in this situation and that its policy did not in fact provide such coverage.[71]

It is clear that the UMC statute sets the minimum standard of protection which the legislature deemed acceptable, and any attempt by an insurer to dilute or diminish UMC is contrary to public policy.[72] For example, a provision in a policy limiting the application of UMC coverage to accidents which directly involve an automobile insured under the principal policy, is contrary to the public policy expressed in the statute and is therefore void.[73]

---

[68]For purposes of liability coverage Indiana Farmers' policy, Section A, defined "Persons Insured" to include, among others: "(a) The named insured. . . ." 407 N.E.2d at 257.

[69]For purposes of uninsured motorist coverage, Indiana Farmers' policy, Section C, "Persons Insured" includes:

(a) The *named insured* and any *designated insured* and, while residents of the same household, the spouse and relatives of either;
(b) any other person while *occupying* an *insured highway vehicle*;
(c) any person, with respect to damages he is entitled to recover because of *bodily injury* to which this insurance applies sustained by an *insured* under (a) or (b) above.

Id. (emphasis in original).

[70]IND. CODE § 27-7-5-1 (1976). In pertinent part, that section states:

> No automobile liability or motor vehicle liability policy or insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state, unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in [9-2-1-15] . . . , under policy provisions approved by the commissioner of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom.

Id.

[71]Section C of the Indiana Farmers policy contained an exclusion reading in part:

> Exclusions: This insurance does not apply:
>
> . . .
>
> "(b) to *bodily injury* to an insured while *occupying a highway vehicle* (other than an *insured highway vehicle*) owned by . . . any relative resident in the same household as the *named or designated insured* . . . but this exclusion does not apply to the named insured or his relatives while *occupying* . . . a highway vehicle owned by a designated insured or his relatives; . . ."

407 N.E.2d at 257 (emphasis in original).

[72]Indiana Ins. Co. v. Noble, 148 Ind. App. 297, 265 N.E.2d 419 (1970).

[73]Cannon v. American Underwriters, Inc., 150 Ind. App. 21, 275 N.E.2d 567 (1971). *Cannon* quoted with approval the following language from Motorists Mut. Ins. Co. v.

The issue in *Indiana Farmers Mutual* was whether an insurance company could permissibly limit uninsured motorist coverage to only those persons who are insured under the liability coverage afforded by the policy. The court of appeals quoted one of its earlier opinions which stated that " '[w]hile the statute does not specifically define "insured" for the purposes of determining who is allowed to recover under the uninsured provision, it is our interpretation that the legislature intended persons insured under the liability policy to be those who would recover under the uninsured motorist coverage.' "[74] Additionally, this court recognized that the few courts which have decided this specific issue are divided as to which definition should prevail.[75] The court proceeded to hold that "the most reasonable interpretation of [Indiana's] uninsured motorist statute is one which results in coverage when the person is listed as a person insured under the liability portion of the policy."[76]

This result is eminently correct. Given Indiana's public policy of not mandating liability coverage, there are sound policy reasons for tying the requirement of UMC to liability coverage. Because the legislature is not likely to mandate liability coverage, uninsured motorists will continue to be a problem. It was sound public policy for the legislature to attack this problem by requiring that UMC be extended to those persons who are insured for liability. However, those persons who are uninsured for liability should not be protected by the public policy of this state from their own kind. By tying UMC to liability coverage, the legislature was saying that if a driver has liability coverage to protect the other person whom he injures

---

Bittler, 14 Ohio Misc. 23, 235 N.E.2d 745 (1968): "It is not necessary for an injured insured to be occupying any automobile to be entitled to the protection of this [UMC] endorsement. If he is injured, by accident while a pedestrian as the result of the operation of an uninsured automobile, he is covered." *Id.* at 31, 235 N.E.2d at 750, *quoted in* 150 Ind. App. at 29, 275 N.E.2d at 571.

[74]407 N.E.2d at 258 (quoting Vernon Fire & Cas. Co. v. American Underwriters, Inc., 171 Ind. App. 309, 313, 356 N.E.2d 693, 696 (1976)).

[75]Two recent Michigan cases have held that in interpreting the language of the UMC regarding "persons insured thereunder," the Michigan legislature was referring to persons insured under the liability coverage portion of the policy. *See* Pappas v. Central National Ins. Group of Omaha, 400 Mich. 475, 255 N.W.2d 629 (1977); Washington v. Travelers Ins. Co., 92 Mich. App. 151, 284 N.W.2d 754 (1979). Alabama courts have generally held that in order to come within the UMC, the insurer must be required to be legally liable for bodily injury under its policy. *See* United States Fidelity & Guar. Co. v. Perry, 361 So. 2d 594 (Ala. Ct. App. 1978); State Farm Auto. Ins. Co. v. Reaves, 292 Ala. 218, 292 So. 2d 95 (1974). However, in interpreting their uninsured motorist statute that an insured, as used in the statute, mans insured as defined in the policy's uninsured motorist coverage. *See* Forrester v. State Mut. Auto. Ins. Co., 213 Kan. 442, 517 P.2d 173 (1973).

See generally 2 I. SCHERMER, AUTOMOBILE LIABILITY INSURANCE § 21 (1981); A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE § 12.13 (1969 & Supp. 1981).

[76]407 N.E.2d at 259.

and, if the first driver is also injured in the collision, the public policy of this state will give him some minimal protection if that other person is uninsured.

D. Omnibus Clause

The term "omnibus clause" refers to a liability policy provision which designates additional insureds by an expansive class description expressed in terms of some relationship to the insured. Omnibus clauses have been a prolific source of litigation. Many of the cases involve disputes about "permission express or implied"—whether a person who was using the car at the time of the accident had been allowed by the named insured to use it only for a limited time or purpose.[77]

Two objectives are generally given in support of the development of omnibus clauses. First, it serves the interests of the named insured by providing coverage to persons who are the "natural objects of his concern."[78] Second, it serves the interests of innocent victims of incidents to which the insurance coverage applies.[79] This latter consideration has been a major influence upon legislation that mandates or encourages the inclusion of omnibus clauses in liability insurance coverage.[80]

Regrettably, rather than expand the class of insured persons to reflect these two objectives, Indiana Code section 27-1-13-7[81] mandates only that the policy *insure such owner* against liability for damages caused by any person legally operating the insured vehicle with the permission of the owner.[82] Fortunately, the Indiana insurance industry has not designed their omnibus clauses to merely serve this limited risk of protecting the owner of a vehicle from the tort of negligent entrustment[83] or from the application of the doctrine of respondeat superior.[84]

Jurisdictions called on to decide whether a permittee deviated from the owner's scope of permission have adopted one of three views. The liberal view or "initial permission" rule allows coverage if a person has permission to use the automobile irrespective of any

---

[77]KEETON, *supra* note 39, at 223.

[78]*Id.* at 222.

[79]*Id.* at 223.

[80]*Id.*

[81]IND. CODE § 27-1-13-7 (1976).

[82]*Id.*

[83]*See, e.g.*, Alspach v. McLaughlin, 144 Ind. App. 592, 247 N.E.2d 840 (1969) (intoxicated person); Smith v. Thomas, 126 Ind. App. 59, 130 N.E.2d 85 (1955).

[84]*See, e.g.*, Trinity Universal Ins. Co. v. Farmers Mut. Auto. Ins. Co., 309 F.2d 283 (7th Cir. 1962); Challis v. Commercial Standard Ins. Co., 117 Ind. App. 180, 69 N.E.2d 178 (1946).

deviations, as long as the car remains in his possession.[85] The moderate or "minor deviation" rule allows coverage only where the deviation does not constitute a gross violation of the scope of permission.[86] The strict or "conversion" rule denies coverage for any deviation from the time, place, or purpose specified.[87] In all but the first view, the question of coverage is dependent upon petty factual distinctions—of what was or was not said and done—that bear on the scope of permission granted. The result is unending litigation.

A deficiency of the standard omnibus clause is apparent when the named insured gives permission to a second person to use the car, and that person gives permission to a third person, called the sub-permittee or permittee's permittee.[88] Typically, when the automobile is turned over to the original permittee, the named insured neither expressly authorizes nor prohibits its use by the third party. The courts generally allow coverage to the sub-permittee in this situation, holding that his use of the car was for the benefit of the original permittee.[89] If the named insured expressly prohibits the use of the vehicle by third persons, the sub-permittee is generally not covered when using the car for his own purposes.[90]

This latter situation was present in *Riverside Insurance Company of America v. Smith*.[91] Willetta Heath was given the use of her mother's car for the express purpose of commuting to and from Willetta's place of employment. One evening a friend of Willetta's, Kathy Arnold, asked to use the insured vehicle. Without calling her mother, Willetta allowed Kathy to take possesion of the car. Kathy was involved in a collision with another vehicle in which she lost her life as did the appellant's decedent who was in the other car. An action was instituted in federal district court by the insurer of the car being driven by the sub-permittee. The district court directed a verdict for the insurer.[92] During the trial, Willetta's mother testified that she had specifically prohibited Willetta from allowing other persons to operate the car. Further testimony revealed that there was

---

[85]*See, e.g.*, Matits v. Nationwide Mut. Ins. Co., 33 N.J. 488, 166 A.2d 345 (1960); Arnold v. State Farm Mut. Auto. Ins. Co., 158 F. Supp. 1 (S.D. Ind.), *aff'd*, 260 F.2d 161 (7th Cir. 1958).

[86]*See, e.g.*, Employers Mut. Cas. Co. v. Mosqueda, 317 F.2d 609 (5th Cir. 1963); Allied Mut. Cas. Co. v. Nelson, 274 Minn. 297, 143 N.W.2d 635 (1966).

[87]*See, e.g.*, Eagle Fire Co. v. Mullins, 238 S.C. 272, 120 S.E.2d 1 (1961).

[88]KEETON, *supra* note 2, at 226-28.

[89]*See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Automobile Underwriters, Inc., 371 F.2d 999 (7th Cir. 1967).

[90]*See, e.g.*, Horn v. Allied Mut. Cas. Co., 272 F.2d 76 (10th Cir. 1959); Hays v. Country Mut. Ins. Co., 28 Ill. 2d 601, 192 N.E.2d 855 (1963); *but see* Maryland Cas. Co. v. Iowa Nat'l Mut. Ins. Co., 54 Ill. 2d 333, 297 N.E.2d 163 (1973).

[91]628 F.2d 1002 (7th Cir. 1980).

[92]*Id.* at 1004-05.

an exception to this express prohibition; if there was an emergency and Willetta was unable to drive, she could allow someone else to drive the car.[93]

On appeal, appellant argued that Willetta's decision not to return home was within this exception contemplated by her mother. Rejecting this argument, a majority of the court of appeals concluded that the " 'emergency exception' envisioned only the situation where her own children would be incapable of driving themselves home and not a situation where, as here, a third party, confronted with her own difficulties, needed to borrow the . . . car."[94]

Appellants further argued that there was sufficient evidence in the record for the jury to infer that Willetta was impliedly authorized to lend her mother's car to a third person. Applying the test for implied authorization as set forth in *Home Mutual Insurance Co. v. Automobile Underwriters, Inc.*,[95] the majority concluded that Kathy was not acting with implied authorization because her use of the car was not within the scope of the original permission—to use the car for commuting to and from Willetta's place of employment.[96]

The appellants additionally argued that Indiana public policy requires a liberal interpretation of omnibus clauses.[97] The omnibus clause of the Riverside policy referred not only to express or implied authority to permit others to use the car, but to apparent authority to do so. Appellants argued that the court erred in directing a verdict because there was sufficient evidence in the record to create an issue of fact for the jury concerning Willetta's apparent authority to lend her mother's car.[98] Again, the majority rejected these contentions and pointed out that the Indiana statute does not require insurance policies to cover the liability of *permissive users*.[99]

---

[93]*Id.* at 1005-07.

[94]*Id.* at 1007.

[95]261 F. Supp. 402 (S.D. Ind. 1966). "'[C]onsent of the owner to the use by a second permittee of an automobile loaned to a first permittee will be implied in Indiana, if such use is for the benefit of the first permittee, and within the scope of his original permission.' " *Id.* at 405, *quoted in* 628 F.2d at 1007.

[96]628 F.2d at 1007.

[97]*Id.* at 1008.

[98]*Id.*

[99]*Id.* In reference to insureds, the policy provides:

"Definition of Insured. Except as provided under Insuring Agreement V and Coverage C—Section (2), the unqualified word "Insured" includes the Named Insured and, if the Named Insured is an individual, his spouse, and also includes any other person while using the automobile or any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the Named Insured or spouse or with the permission of either or with the permission of an adult member of the Named Insured's

However, the opinion makes no mention of an earlier decision of the Seventh Circuit Court of Appeals which stated that "the law of Indiana is here governing, and Indiana follows a liberal or broad approach in the construction of omnibus clauses in automobile insurance policies."[100] The majority of the court noted that although the term "authorized" appeared in the policy's omnibus clause,[101] the words of limitation contained in the statute mean only that Willetta was "empowered" to act as agent for her mother. Thus, since there was a lack of evidence to establish an agency relationship between Willetta and her mother, the court concluded that "apparent authority" concepts were not applicable.[102]

Judge Swygert based his dissenting opinion on this issue. Referring to the majority's conclusion that "although the insurance company itself selected the word 'authorized' for its policy, the company really intended to use the word 'empowered' and thereby to exclude apparent authority as a basis for coverage," as a legerdemain,[103] the dissent stated that "Indiana's law has for nearly a century recognized 'apparent' authority."[104] The dissent concluded that the majority's decision denied the appellants their day in court and gave the insurer an undeserved windfall because there was sufficient evidence in the record to support a jury finding that Willetta had apparent authority to lend the car to Kathy.[105]

From the viewpoint of a permissive user of an insured vehicle, it would be a misplaced belief that the Indiana statute requires the insurer to provide him with liability coverage. It is unfortunate that this so-called "requirement" of coverage is viewed as representative of Indiana's public policy concerning who should have the protection of or access to any liability coverage on insured vehicles. It is more unfortunate that the majority of the court in *Riverside* was able to refer to this statute as support for their decision to read the policy's omnibus clause more restrictively than, perhaps, was intended by the drafters.[106]

One of the trial court's findings in *Riverside* states that "under

---

household, other than a chauffeur or domestic servant, provided that such adult member of said household is *authorized* by the Named Insured or spouse to grant such permission."

Id. at 1004 (emphasis added).

[100]Riehl v. National Mut. Ins. Co., 374 F.2d 739, 744 (7th Cir. 1967).

[101]628 F.2d at 1008.

[102]*Id.*

[103]*Id.* at 1010. (Swygert, J., dissenting).

[104]*Id.* (citing Over v. Schiffling, 102 Ind. 191, 196, 26 N.E. 91, 93 (1885)).

[105]628 F.2d at 1010-11.

[106]*See* notes 97-102 *supra* and accompanying text.

Indiana law, where there has been an express prohibition to a permittee against allowing others to operate the automobile, the insurance company has no duty to defend or pay any judgment obtained against such operator."[107] In fact, no Indiana appellate court has decided a case involving this issue. The case cited by the district court actually holds that since the car was used by the sub-permittee to accomplish the purpose for which permission was given initially, the first permittee has, in the absence of restrictions imposed by the insured, *implied* permission to lend the car.[108]

E. Insurer's Subrogation Rights Prejudiced

In *Hockelberg v. Farm Bureau Insurance Co.*,[109] the court of appeals decided whether the trial court erred in rendering summary judgment against Hockelberg because her release of the defendants in her personal injury lawsuit prejudiced the subrogation rights of Farm Bureau.[110] After filing suit for bodily injuries sustained in an automobile collison, the plaintiff settled her personal injury lawsuit for $15,000, gave the defendants a release discharging them from all liability, and dismissed the cause with prejudice. Prior to dismissal, Hockelberg submitted a claim against Farm Bureau for $2,000 of medical expenses. Farm Bureau denied the claim because the plaintiff refused to sign a medical subrogation receipt.

An insurer's rights of subrogation derive from those of its insured, and it "takes no rights other than those which the insured had."[111] Based on this principle, the court of appeals affirmed the trial court's decision holding that when an insured, prior to settlement with her insurer, gives the tortfeasors a complete release of claims and dismisses her suit with prejudice, the insurer's subrogation rights are destroyed and with them go, by operation of law, any right of action that the insured may have had on the policy.[112] The

---

[107]628 F.2d at 1005 (citing State Farm Mut. Auto. Ins. Co. v. Automobile Underwriters, Inc., 371 F.2d 999 (7th Cir. 1967)).

[108]628 F.2d at 1002.

[109]407 N.E.2d 1160 (Ind. Ct. App. 1980).

[110]The subrogation clause in Farm Bureau's policy provided:

"12. SUBROGATION.

In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. *The insured shall do nothing after loss to prejudice such rights.*"

Id. at 1161 (emphasis in original).

[111]*Id.* at 1162 (quoting American States Ins. Co. v. Williams, 151 Ind. App. 99, 106, 278 N.E.2d 295, 300 (1972)).

[112]407 N.E.2d at 1162.

court distinguished *American Automobile Insurance Co. v. Spieker*,[113] which stated that " '[i]f the tort-feasor, with knowledge *that the insurer has already made payment to the insured*, makes settlement with him and thus obtains a release, it will not be a defense as against the insurer in enforcing its rights as subrogee.' "[114] *Spieker* was inapplicable because the insurer paid Hockelberg *after* she had settled with the tortfeasors.[115]

F. Limitations of Coverage of Comprehensive General Liability Policy

Indiana Insurance Co. v. DeZutti,[116] a case in which the supreme court reversed both the court of appeals and the trial court, illustrates that if courts encounter difficulty in interpreting insurance policies, it is little wonder that laymen experience the same problems. Gilson, a general contractor, was sued for damages which were caused by faulty construction on a house which he had built for the DeZuttis. The DeZuttis contended that their house's brick and mortar were cracking because the house was settling as a result of defectively constructed footings. Gilson called upon Indiana Insurance to provide his defense pursuant to the terms of a comprehensive general liability policy. Indiana Insurance maintained that the alleged loss was not covered by the policy. Gilson instituted a declaratory judgment action in which the trial court found that the policy covered the alleged loss and that Indiana was obligated to defend its insured against the action for breach of warranty of fitness. The trial court determined that when certain exclusions were read in conjunction with another exclusion,[117] the policy was ambiguous and that such ambiguity should be resolved in favor of the insured. The

---

[113]97 Ind. App. 533, 187 N.E. 355 (1933).

[114]*Id.* at 536, 187 N.E. at 356, *quoted in* 407 N.E.2d at 1161 (emphasis added).

[115]407 N.E.2d at 1161.

[116]408 N.E.2d 1275 (Ind. 1980).

[117]The policy contained the following pertinent exclusions:

"Exclusions

This insurance does not apply:

(a) to liability assumed by the insured under any contract or agreement except an incidental contract; but, this exclusion does not apply to a warranty of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner . . .

(n) to property damage to the named insured's products arising out of such products or any part of such products;

(o) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith. . . ."

Id. at 1277.

court of appeals affirmed this determination,[118] but the supreme court reversed with instructions to vacate the trial court judgment and enter judgment in favor of Indiana.[119]

The policy provided coverage for property damage resulting from, *inter alia*, "completed operations hazard" and "products hazard."[120] It was undisputed that the property damage arose after construction was completed and possession of the house had been relinquished to the DeZuttis.[121] The supreme court therefore concluded that the damage came within the definitions of these two terms and that "there was coverage liability for breach of warranty of fitness unless it was properly excluded in some manner. The question is whether the damage to the insured's work was properly excluded . . . . "[122] Holding that the language of exclusion (o) was broad, unambiguous, and all-inclusive, the supreme court concluded that the risk assumed by the insurer was that of personal injury or damage to property *other* than the insured's own work or product.[123]

The insured had argued that the express exception for breach of warranty of fitness contained in exclusion (a) had the effect of granting or extending coverage to breach of contract damages for negligent work. Thus, this extension of coverage was repugnant to exclusions (n) and (o) and, because reasonable men would differ as to the meaning of these exclusions, the resulting ambiguity should be resolved in favor of the insured.[124] The court rejected this argument

---

[118]396 N.E.2d 699 (Ind. Ct. App. 1979).

[119]408 N.E.2d at 1281.

[120]*Id.* at 1277. The policy's Definitions section contained the following pertinent definitions:

> " 'Property damage' means (1) physical injury to or destruction of tangible property which occurs during the policy period. . . .
>
> . . . .
>
> " 'Completed operations hazard' includes bodily injury and property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. . . .
>
> . . . .
>
> " 'Products hazard' includes bodily injury and property damage arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others. . . ."

Id.

[121]*Id.* at 1277-78.

[122]*Id.* at 1278.

[123]*Id.*

[124]*Id.*

and stated that "[t]his reasoning ignores the basic principle that exclusion clauses do not grant or enlarge coverage. They are limitations or restrictions on the insuring clause."[125] In support of this proposition, the court adopted the holding of a New Jersey Supreme Court case, *Weedo v. Stone-E-Brick, Inc.*,[126] which reversed the only case authority cited by the court of appeals in its decision to affirm.[127] The Indiana Supreme Court reasoned that to adopt the insured's theory of the risk assumed by Indiana "would effectively convert the policy into a performance bond or guarantee of contractual performance and result in coverage for repair and replacement of the insured's own faulty workmanship."[128] Actually, that risk is a business risk and expense not intended to be covered under the policy, and was excluded by exceptions (n) and (o).

The court of appeals, after it determined that an ambiguity existed when reading the exclusions in concert, did not address the issue of whether the trial court erred when it found that exclusion (n) did not apply to the DeZutti claim and that exclusion (o) was applicable only to the damage to the footing but not damage to the remainder of the house caused by the defective footing. The supreme court proceeded to address these questions. It determined that exclusions (n) and (o) "clearly exclude coverage for damages to the insured's product or work when such damages are confined *to* the product or work and caused *by* the product or work, or *any part thereof*."[129] It further reasoned that exclusion (o) rather than (n) was more applicable because the property damage was attributable to work performed by or on behalf of the named insured.[130] Gilson, the named insured, was the general contractor and his product or work was the entire house, including the footings, which he built and sold. The footing was a component part of Gilson's product or work done on his behalf.[131]

---

[125] *Id.*

[126] 81 N.J. 233, 405 A.2d 788 (1979).

[127] Weedo v. Stone-E-Brick, Inc., 155 N.J. Super. 474, 382 A.2d 1152 (1977), *quoted in* 396 N.E.2d at 701.

[128] 408 N.E.2d at 1279. *See generally* Henderson, *Insurance Protection for Products Liability and Completed Operations—What Every Lawyer Should Know*, 50 NEB. L. REV. 415 (1971).

[129] *Id.* at 1280 (emphasis in original). The court noted that Gilson had relied on older cases which had construed a currently nonexistent standard insurance clause containing the "ambiguous phrase 'out of which the occurrence arises.'" *Id.* at 1281. These earlier cases had construed this clause to only exclude damages caused by a defective part and not by the insured's entire product. When this clause was removed in 1966, and this single exclusion was divided into separate clauses as represented by (n) and (o), there was no longer a basis for this distinction. *Id.*

[130] *Id.*

[131] *Id.*

Thus, it appears that if the subcontractor responsible for the construction of the defective footing, had an insurance policy similar to that owned by Gilson, it would be available to indemnify Gilson for the damage to the remainder of the house, but not that damage to the defective footing.[132]

---

[132] *Id.* at 1280.

XI. Labor Law

EDWARD P. ARCHER*

The Indiana Supreme Court took the period covered by this year's survey off from labor law cases. However, significant discussions from the courts of appeals abound.

A. *Teacher Bargaining*

In *Anderson Federation of Teachers v. Alexander*,[1] the court of appeals addressed the question of the legality of an agency shop clause under the Indiana teacher bargaining statute. The collective bargaining agreement between the American Federation of Teachers (AFT) and the Anderson Community School Corporation provided that all "members of the bargaining unit who are not also members of the AFT *have an obligation, as a condition of employment, to pay a representation fee to the AFT*, in an amount equal to the membership dues of the AFT less the cost of benefit [*sic*] provided solely for AFT members."[2]

This action was filed by Edna Alexander and 114 other Anderson Community School teachers seeking a declaratory judgment that the agency shop agreement was invalid and asking for an injunction against its enforcement.[3] The trial court held that this agency shop agreement exceeded the Anderson schools' authority as it could find no express statutory authority for the school corporation to enter into an agency shop agreement.[4]

The parties were in agreement that the Teacher Tenure Act[5] established the sole grounds for termination of a tenured Indiana teacher. However, they and the amicus participants (Indiana State Teachers Association (ISTA) and the Indiana School Boards Association (ISBA)) differed as to whether under the agency shop agreement, failure to pay the representation fee would constitute a basis for termination of a tenured teacher. The AFT argued that such a conclusion would be premature.[6] The ISTA argued that failure to pay the representation fee would constitute "good and just cause"

---

*Professor of Law, Indiana University School of Law—Indianapolis. B.M.E., Rensselaer Polytechnic Institute, 1958; J.D., Georgetown University, 1962; LL.M., 1964. The author wishes to extend his appreciation to S. Andrew Bowman for his assistance in the preparation of this Article.

[1] 416 N.E.2d 1327 (Ind. Ct. App. 1981).

[2] *Id.* at 1329 (emphasis in original).

[3] *Id.* at 1328.

[4] *Id.* at 1329.

[5] IND. CODE §§ 20-6.1-4-10 to -14 (1976).

[6] 416 N.E.2d at 1330.

for dismissal of a tenured teacher under the Tenure Act.[7] Alexander and the ISBA argued that the phrase "condition of employment" could only mean that the failure to pay the representation fee would constitute an additional ground for discharging teachers.[8]

The court of appeals first held that the phrase "as a condition of employment" in this context was unambiguous and called for the discharge of teachers not meeting this condition.[9] To determine the validity of the agency shop clause, the court of appeals turned to the 1973 Certified Educational Employee Bargaining Act (CEEBA).[10] The court found that the first section of CEEBA,[11] which notes differences between school-teacher and private employer-employee relationships, coupled with the more concrete sections 3 through 6 of the CEEBA, limited the range of collective bargaining between teachers and school corporations.[12] In particular, the court noted the

---

[7]*Id.* (referring to IND. CODE § 20-6.1-4-10(a)(6) (1976)).

[8]416 N.E.2d at 1330.

[9]*Id.*

[10]IND. CODE §§ 20-7.5-1-1 to -14 (1976).

[11]*Id.* § 20-7.5-1-1(d). The first section of the CEEBA provides in part:

> The relationship between school corporation employers and certificated school employees is not comparable to the relation between private employers and employees among others for the following reasons: (i) a public school corporation is not operated for profit but to insure the citizens of the State rights guaranteed them by the Indiana State Constitution; (ii) the obligation to educate children and the methods by which such education is effected will change rapidly with increasing technology, the needs of an advancing civilization and requirements for substantial educational innovation; (iii) the Indiana General Assembly has delegated the discretion to carry out this changing and innovative educational function to the local governing bodies of school corporations, composed of citizens elected or appointed under applicable law, a delegation which these bodies may not and should not bargain away; and (iv) public school corporations have different obligations with respect to certificated school employees under constitutional and statutory requirements than private employers have to their employees.

[12]*Id.* § 20-7.5-1-3 provides in part:

> [S]chool employers and school employees shall have the obligation and the right to bargain collectively the items set forth in Section 4, the right and obligation to discuss any item set forth in Section 5 and shall enter into a contract embodying any of the matters on which they have bargained collectively. No contract may include provisions in conflict with (a) any right or benefit established by federal or state law, (b) school employee rights as defined in Section 6(a) of this chapter, or (c) school employer rights as defined in Section 6(b) of this chapter. It shall be unlawful for a school employer to enter into any agreement that would place such employer in a position of deficit financing as defined in this chapter, and any contract which provides for deficit financing shall be void to that extent and any individual teacher's contract executed in accordance with such contract shall be void to such extent.

Id. § 20-7.5-1-4 commands that:

> A school employer shall bargain collectively with the exclusive representative on the following: salary, wages, hours, and salary and wage related

section 3 prohibition against the parties agreeing to any provision in conflict with the parties' section 6 rights and held that the school corporation's section 6(b) duties to "suspend or discharge its employees in accordance with applicable law" and to "relieve its employees from duties because of lack of work or other legitimate reason" in the sole discretion of the school corporation, may not be restricted by a collective bargaining agreement.[13]

In this regard the court concluded that:

> The decision, then, of whether to retain or dismiss a teacher has been designated by the legislature as being the

---

fringe benefits. A contract may also contain a grievance procedure culminating in final and binding arbitration of unresolved grievances, but such binding arbitration shall have no power to amend, add to, subtract from or supplement provisions of the contract.

Id. § 20-7.5-1-5 provides as follows:

(a) A school employer shall discuss with the exclusive representative of certificated employees, and may but shall not be required to bargain collectively, negotiate or enter into a written contract concerning or be subject to or enter into impasse procedures on the following matters: working conditions, other than those provided in Section 4; curriculum development and revision; textbook selection; teaching methods; selection, assignment or promotion of personnel; student discipline; expulsion or supervision of students; pupil-teacher ratio; class size or budget appropriations: Provided, however, That any items included in the 1972-1973 agreements between any employer school corporation and the employee organization shall continue to be bargainable.

(b) Nothing shall prevent a superintendent or his designee from making recommendations to the school employer.

Id. § 20-7.5-1-6 provides in part:

(a) School employees shall have the right to form, join or assist employee organizations, to participate in collective bargaining with school employers through representatives of their own choosing and to engage in other activities, individually or in concert for the purpose of establishing, maintaining, or improving salaries, wages, hours, salary and wage related fringe benefits and other matters as defined in Sections 4 and 5.

(b) School employers shall have the responsibility and authority to manage and direct in behalf of the public the operations and activities of the school corporation to the full extent authorized by law. Such responsibility and activity shall include but not be limited to the right of the school employer to:

(1) direct the work of its employees;
(2) establish policy;
(3) hire, promote, demote, transfer, assign and retain employees;
(4) suspend or discharge its employees in accordance with applicable law;
(5) maintain the efficiency of school operations;
(6) relieve its employees from duties because of lack of work or other legitimate reason;
(7) take actions necessary to carry out the mission of the public schools as provided by law.

[13]416 N.E.2d at 1332 (quoting IND. CODE § 20-7.5-1-6(b) (1976)).

> sole province of school corporations. School corporations are forbidden to encumber their discretion in this area, and in particular, they may not make collective bargaining agreements in which they undertake to fire an entire class of teachers.
>
> Thus, section 3(c) and 6(b) of the CEEBA plainly remove the firing of teachers from the scope of collective bargaining. The legislative intent found in section 1(d) takes on the substance of unambiguous command in sections 3 and 6.[14]

The court rejected the AFT's assertion that its intent was to collect such fees by bringing suit and not by insisting upon dismissal of non-paying teachers, reasoning that the essence of the agency shop agreement required the Anderson schools to discharge non-paying teachers and that this requirement could not be severed from the clause without rendering the clause meaningless.[15]

The court concluded its opinion by highlighting its limitations as follows:

> Our conclusion that the entire agency shop provision must fail is not to be taken as a criticism of prior decisions as to the validity of union security agreements outside of a school context. Nor do we suggest that such agreements between schools and teachers are invalid *per se*. We say only that construing the provisions of the CEEBA *in toto*, they forbid school corporations to make *any* collective bargaining agreement—for union security purposes or otherwise—in which the schools undertake the mandatory discharge of a given class of teachers.[16]

The court thus sustained the trial court's grant of summary judgment to Alexander. Judge Buchanan wrote the opinion, and Judges Sullivan and Shields concurred in the result without any explanatory comment.

This is an important case because it clearly holds that under the CEEBA teacher unions cannot negotiate agency shop agreements in which teachers must pay the equivalent of union dues under penalty of discharge. The discharge penalty is obviously important to the efficient collection of such payments from recalcitrant teachers. The decision in this case leaves open the possibility of a less efficient collection system under which the union could use court actions to compel recalcitrant teachers to make payments. Such an agency shop

---

[14]416 N.E.2d at 1332.

[15]*Id.* at 1333.

[16]*Id.* (emphasis in original).

clause would not be barred under the Teacher Tenure Act but could possibly be found to be illegal under sections 7(1) or 7(3) of the CEEBA.[17] These issues await future litigation.

B. Bargaining for Other Public Employees

The courts of appeals addressed two significant cases relating to collective bargaining for non-teacher public employees in Indiana. Since *Indiana Education Employment Relations Board v. Benton Community School*,[18] in which the supreme court declared the Indiana Public Employees Bargaining Act[19] unconstitutional, there has been no statutory authorization for bargaining for Indiana public employees other than teachers. If the courts of appeals cases for the past survey term set the trend, the need for a public employees' bargaining bill is great if any meaningful bargaining is to occur.

In *County Department of Public Welfare v. AFSCME*,[20] the County Welfare Department and the AFSCME entered into a consent election agreement on May 21, 1975, just prior to the effective date of the Public Employees Bargaining Act, which stated that if the union won the election the employer would recognize it as the exclusive bargaining agent and would begin negotiations on a contract within fifteen days.

The union won the election, and the parties began negotiating in early August and continued to bargain until January, 1976, at which time the employer refused to bargain further pursuant to a request from the State Welfare Director and the Director of Labor Relations for the State Personnel Division who maintained that the employees were state rather than county employees. Thereafter, in *Benton Community School* the Indiana Supreme Court declared the Public Employees Bargaining Act unconstitutional,[21] and the employer declined to negotiate further. The union instituted this action to compel the employer to bargain under principles of general contract law.[22]

---

[17]IND. CODE § 20-7.5-1-7(a) (1976) provides:

> It shall be an unfair practice for a school employer to:
>
> (1) interfere with, restrain or coerce school employees in the exercise of the rights guaranteed in Section 6 of this chapter.
>
> . . . .
>
> (3) encourage or discourage membership in any school employee organization through discrimination in regard to hiring or tenure of employment or any term or condition of employment;
>
> . . . .

[18]266 Ind. 491, 365 N.E.2d 752 (1977).

[19]IND. CODE §§ 22-6-4-1 to -13 (1976).

[20]416 N.E.2d 153 (Ind. Ct. App. 1981).

[21]266 Ind. at 507, 510, 365 N.E.2d at 760, 761.

[22]416 N.E.2d at 154.

The court of appeals distinguished *Gary Teachers Union Local 4 v. School City of Gary*[23] and *East Chicago Teachers Union Local 511 v. Board of Trustees*[24] in which the court had enforced a teacher collective bargaining agreement, which predated CEEBA, by noting that both of these teacher cases involved enforceability of collective bargaining contracts as opposed to mere agreements to bargain and that neither of these teacher cases presented a question as to the effect of the agreement upon employees who did not desire to have the union as their agent.[25] Regarding this latter distinction, the court stated that "[t]he common law of this state does not, of course, grant to one group of individuals the right to impose their will upon another group merely because the whole number work for the same employer and the former group constitute something more than 50% of the total."[26]

The court went on to assume, arguendo, that the board could enter into an agreement for the employees who wanted the union to speak for them. The court then questioned the effect of the election agreement as an independent contract. The court's reasoning becomes confusing at this point. First, the court noted that the consent election agreement only required the parties to "begin negotiations on a contract within 15 days" and concluded that the parties' negotiations for several months fulfilled that requirement. The court then stated that this conclusion was not altered by the consent agreement language which called for recognition of the union as the exclusive bargaining agent "in compliance with existing state and federal laws" because "[w]ith the state statute declared unconstitutional, there simply were no state or federal laws which applied to permit the status referred to."[27]

Judge Staton wrote a lengthy concurring opinion in which he rejected "[t]he majority's cursory (and perhaps inaccurate) contractual analysis of the consent election agreement."[28] Judge Staton viewed the issue "as being whether county-level welfare employees may impose a collective bargaining requirement upon an employment structure which is comprehensively regulated by an existing state merit system."[29] Judge Staton noted that the State Personnel Act and the merit system placed terms of employment essential to bargaining within the control of the State Personnel Board and concluded that

---

[23]152 Ind. App. 591, 284 N.E.2d 108 (1972).
[24]153 Ind. App. 463, 287 N.E.2d 891 (1972).
[25]416 N.E.2d at 155.
[26]*Id.*
[27]*Id.* at 156.
[28]*Id.* at 156-57 (Staton, J., concurring).
[29]*Id.* at 157.

the county departments and the State Personnel Board functioned as an integrated enterprise for purposes of negotiating a collective bargaining agreement.[30] Referring to *Fort Wayne Patrolman's Benevolent Association, Inc. v. City of Fort Wayne*,[31] Judge Staton pointed out that the county department lacked managerial authority over the terms of employment which were the intended subjects of union negotiations and concluded, based upon conflicts he found between union proposals and the state merit system, that the union was not entitled to specific performance of the consent election agreement.[32] Judge Staton went on to emphasize:

> My interpretation of the legal issues in this case should not be construed as precluding any future bargaining between the Lake County Welfare Department and its employees should they decide to voluntarily negotiate again without state participation. The county welfare department may negotiate terms of employment over which they exercise managerial control, i.e., working conditions. However, if the county welfare department and its employees enter into such negotiations, then they must manifest an intent to comply with the state merit system guidelines established by statute and administrative regulation. This latter prerequisite did not occur in the present case.[33]

According to Judge Staton, an agreement to make an agreement is enforceable if all the conditions of the contemplated agreement are specified:

> If the employees of the Lake County Welfare Department intend to seek a consent election agreement which contains the specific requirements of an enforceable contract, then they must identify the proper governmental entity with which to negotiate. Without the proper party, any collective bargaining agreement negotiated by the parties would be rendered a nullity.[34]

The majority opinion is far more sweeping in its impact. The court apparently concluded that absent statutory authority no union can serve as an exclusive representative of public employees in Indiana. Judge Staton dealt with this position in footnote two in which

---

[30]*Id.*

[31]Fort Wayne Patrolman's Benevolent Ass'n, Inc. v. City of Fort Wayne, 408 N.E.2d 1295, *reh. denied with add't'l opinion*, 411 N.E.2d 630 (Ind. Ct. App. 1980).

[32]416 N.E.2d at 160.

[33]*Id.*

[34]*Id.* at 161.

he cited persuasive Indiana authority for the proposition that even absent statutory authority a public employer may enter into a collective bargaining agreement providing for exclusive representation of all employees by their majority representative.[35]

The majority opinion could simply have been that the consent election agreement was in fact complied with because the agreement required only that the board begin negotiations with the union. The parties did in fact negotiate for several months, apparently without agreement, before the board refused to bargain further. The court recognized that "[w]hat is critical is that the agreement required no more."[36]

The court then, however, concluded that the language in the instrument was "at most an agreement to make an agreement."[37] Judge Staton, in his concurring opinion, accepted this analysis.[38] This analysis, however, is contrary to customary labor relations experience. The consent agreement in this case was an agreement to bargain, not to agree. Even under the National Labor Relations Act,[39] parties are only required to bargain in good faith, not to agree to a proposal or to make a concession.[40] Such is the common understanding in labor relations.

The Indiana Supreme Court acknowledged in *Benton Community Schools* that the Indiana Public Employee Bargaining Act (IPEBA) was largely patterned after the NLRA.[41] Because the consent election agreement in this case was entered into with the expectation that the IPEBA would apply to the continuing relationship between the parties, it is likely that the agreed intent of the parties was that they bargain to seek to reach an agreement, not that they agree to make an agreement. If this analysis is correct, this portion of the reasoning of both the majority and concurring opinion fails.

Judge Staton's concern that the union was seeking to bargain matters which were not within the control of the county board is valid. Clearly, the county board would have no authority to negotiate changes in the terms and conditions of employment dictated under state statutory authority. However, Judge Staton concluded

---

[35]*Id.* at 158 n.2. In addition to *Gary Teachers* and *East Chicago Teachers*, Judge Staton cited Weest v. Board of School Commissioners, 162 Ind. App. 614, 320 N.E.2d 748 (1974) for the proposition that a public employee may enter into a collective bargaining agreement providing for exclusive representation of all employees by their majority-elected representative.

[36]416 N.E.2d at 156.

[37]*Id.*

[38]*Id.* at 160 (Staton, J., concurring).

[39]29 U.S.C. §§ 151-169 (1976 & Supp. III 1979).

[40]*Id.* at § 158(d) (1976).

[41]266 Ind. at 500, 365 N.E.2d at 756.

that the county board could negotiate terms of employment over which it had managerial control.[42] If this is true, the agreement in this case to bargain should have been enforced to compel bargaining for a reasonable period of time with regard only to the terms and conditions of employment within the managerial control of the county board.

In *Fort Wayne Patrolman's Benevolent Association, Inc. v. City of Fort Wayne*,[43] the city disavowed a bargaining agreement negotiated and executed by the mayor. The Patrolman's Benevolent Association (PBA) brought this action to enforce the agreement. In this case, the mayor had entered into an agreement which recognized the PBA as the bargaining representative of all city patrolmen. Two months later, the Fort Wayne Common Council passed a resolution approving the recognition agreement. Thereafter, in November, 1975, the mayor and the PBA bargained to an agreement which was executed by two city negotiators and approved by the mayor. In January, 1976, a new mayor assumed office and disaffirmed the collective bargaining agreement.[44]

Both the PBA and the city sought summary judgment. The PBA argued that governmental entities have implicit authority to recognize exclusive bargaining representatives of public employees, to bargain collectively, and to enter into binding collective bargaining agreements with such representatives.[45]

The trial court held that the exclusion of police from the Public Employee Bargaining Act evidenced the legislature's intent to prohibit police collective bargaining.[46] After the trial court had issued its opinion, the Indiana Supreme Court declared this Act unconstitutional.[47] The court of appeals considered the effect of this supreme court ruling over the city's objection but affirmed the trial court's summary judgment for the city on the grounds that the mayor had acted beyond the authority of his office when he approved this agreement.[48]

The court assumed arguendo that the police could select a bargaining representative to enter into a valid and binding collective bargaining agreement but rejected the PBA's contention that the mayor had the authority to bind the city and held that the failure of the Common Council precisely to ratify the agreement and

---

[42]416 N.E.2d at 160.

[43]408 N.E.2d 1295.

[44]*Id.* at 1298-99.

[45]*Id.* at 1299.

[46]*Id.*

[47]Indiana Educ. Employment Relations Bd. v. Benton Community School Corp., 266 Ind. 491, 365 N.E.2d 752 (1977).

appropriate funds for its implementation and the failure of the Board of Safety to ratify the agreement were fatal to the agreement. The court stated:

> Municipal corporations are creatures of the state. As such, every party dealing with a municipality is bound to take notice of the limitations on its powers and the laws governing the municipality in making contracts. In dealing with a city, you cannot plead ignorance of the laws and thereby make valid an otherwise invalid agreement.[49]

The court construed Indiana law as vesting the mayor with the power to fix salaries of all employees of the city except the police, whose salaries were to be fixed by the Common Council.[50] The court also held that the Common Council resolution approved recognition of the PBA but did not authorize the mayor to enter into a collective bargaining agreement. Thus, "[t]he Mayor had neither the statutory authority to bind the City to this agreement nor the authority of the Common Council to act in their behalf and enter into such an agreement" and "[a]s a result, the collective bargaining agreement was void."[51]

The PBA petitioned for a rehearing seeking a ruling from the court on numerous issues which the court did not address in its decision, including (as itemized by the court):

> (1) whether policemen have a right to (a) select a collective bargaining representative, (b) enter into collective bargaining with municipalities, and (c) enter into collective bargaining agreements; (2) whether the trial court was correct when it interpreted the Indiana Public Employee Labor Relations Act . . . as prohibiting policemen from engaging in collective bargaining, and (3) whether the trial court committed rever-

---

[48]408 N.E.2d at 1301.

[49]*Id.*

[50]*Id.* at 1301-02. The court relied on IND. CODE § 18-2-1-10(6) (1976) which provides that:

> The salaries of each and every appointive officer, employee, deputy, assistant and departmental and institutional head shall be fixed by the mayor subject to the approval of the common council: Provided, That the provisions of this subsection shall not apply to the manner of fixing and the amount of compensation paid by any city to the members of the police and fire departments.

The court also cited *id.* § 18-1-11-2 which provides in part: "The annual pay of all policemen . . . shall be fixed by ordinance of the common council; and it shall be lawful in such ordinance to grade the members of such forces and to regulate their pay, not only by rank, but by their length of service."

[51]408 N.E.2d at 1302.

> sible error when it entered summary judgment in favor of the City of Fort Wayne based upon its interpretation of the Public Employee Labor Relations Act.[52]

The court refused to address these issues because a determination of these issues would have no effect upon this litigation.[53]

The PBA also contended that even if the mayor had no authority to agree to police wages, the remainder of the agreement should be enforced. The court rejected this contention, holding that the mayor had no authority to manage the police because the Common Council had authority over police salaries and the Board of Public Safety had the power to manage other affairs of the police.[54] Finally, the PBA argued that the city should be estopped from denying the validity of the agreement because "the PBA should be able to rely upon the *City's* authority to enter into a collective bargaining agreement under these circumstances . . . ."[55] The court disposed of this argument, noting that "it was not the *City* who we held had no authority to enter into this agreement; it was the *Mayor*."[56]

This case illustrates the very substantial difficulties incurred in public sector bargaining without the benefit of an authorizing statute. The court held that the city could enter into a collective bargaining agreement regarding the terms and conditions of employment for police but that the mayor could not.[57] If the court is correct, to enter into a bargaining agreement covering both wage benefits and other terms and conditions of employment for police, the PBA would have to negotiate with the Common Council regarding wages and with the Board of Public Works regarding other conditions of employment. Clearly, bargaining for police could not take place directly with the Common Council or with the Board of Public Works. Each of these entities would have to authorize a representative to bargain on its behalf. Such authorization would apparently be permissible because the court's opinion is based upon its conclusion that the Common Council had not authorized the mayor to enter into a collective bargaining agreement. The Board of Public Works could also authorize the mayor to be its bargaining representative, or both the Common Council and the Board could designate some other individual to bargain as their representative.

---

[52]411 N.E.2d at 631 (citations omitted).

[53]*Id.*

[54]*Id.* at 631-32.

[55]*Id.* at 632.

[56]*Id.* (emphasis in original).

[57]The court distinguished police from other city employees and noted that the mayor has the authority to negotiate wages for city employees other than police. *Id.*

The court makes clear that a resolution merely extending recognition and endorsing a mayor's extension of recognition to a union will not be construed as authorization to negotiate a collective bargaining agreement. This holding of the court is strained, at least insofar as it relates to the Common Council. The Common Council resolution both extended recognition to the PBA and approved the mayor's recognition of the PBA. Recognition could only lead to bargaining. The Common Council must have been aware that the mayor was bargaining on behalf of the city, yet it neither moved to reject the mayor as its bargaining agent nor to appoint another agent to represent it in bargaining. There is merit to the PBA's position that implicit in the actions of the mayor and the Common Council in this case was the authority to enter into a collective bargaining agreement. Finally, the court's very restrictive interpretation of the authority of public employers to bargain leads to the further question of whether the court would require the Common Council to appropriate funds to meet collective bargaining agreement commitments if the agreement was negotiated by the proper city representatives.

The *Public Welfare* and *City of Fort Wayne* decisions both reflect a retrenchment from prior decisions which permitted public employee bargaining even absent statutory authorization.[58] Clearly, if bargaining is to take place under these decisions, the parties must be extremely careful to obtain approval of any agreement reached from all governmental bodies which control the public employees covered by the agreement: executive, administrative, and perhaps even legislative. An omission of approval from any of these sources of governmental control could be fatal to any agreement reached, particularly in public sector labor relations where agreements are vulnerable to changes in political administrations.

C. *Arbitration Appeals*

While public sector bargaining ran into judicial head winds during the survey period, the enforceability of arbitration awards received strong judicial endorsement. The courts of appeal decided numerous appeals from arbitration awards. The decisions generally supported the parties' agreement to have arbitration serve as a viable, relatively inexpensive means for final and binding resolution of employee-management disputes.

---

[58]*See, e.g.*, Weest v. Board of School Comm'rs, 162 Ind. App. 614, 320 N.E.2d 748 (1974); East Chicago Teachers Union Local 511 v. Board of Trustees, 153 Ind. App. 463, 287 N.E.2d 891 (1972); Gary Teachers Union Local 4 v. School City of Gary, 152 Ind. App. 591, 284 N.E.2d 108 (1972).

1. Public Employee Arbitration Cases.—Public employee cases should be considered as a separate category from private employee cases because the vast body of case law which has evolved over the years construing section 301 of the Labor Management Relations Act[59] has no direct application to public employee cases.

Wagner v. Kendall[60] involved a statutory state employee grievance procedure[61] which authorized the employee to elect to appeal the State Employee Appeal Board decision to arbitrate and provided that "[t]he arbitrator's findings and recommendations shall be binding on both parties and shall immediately be instituted by the commission."[62]

In *Wagner*, the arbitrator ruled for the employee, and the state filed this action under the Indiana Uniform Arbitration Act (UAA)[63] to set aside the arbitrator's award as having been in excess of his authority. The employee contended that review of an arbitrator's decision under the statutory procedure would be under the Administrative Adjudication Act (AAA).[64] The court recognized that the statutory grievance procedure was in the nature of an administrative adjudication and that all steps of the procedure up to arbitration were clearly reviewable under the AAA.[65] Relying upon Illinois case authority,[66] the court concluded first that arbitral resolution of public employee grievances did not involve an illegal delegation of administrative duties.[67] While the court acknowledged that judicial review of such arbitration proceedings could fall under the literal language of either the UAA or the AAA, the court held that the more specific UAA statute should prevail.[68]

---

[59]29 U.S.C. § 185 (1976).

[60]413 N.E.2d 302 (Ind. Ct. App. 1980).

[61]IND. CODE § 4-15-2-35 (1976) provides in relevant part that:

> If the recommendation of the commission is not agreeable to the employee, the employee, within fifteen (15) calendar days from receipt of the commission recommendation, may elect to submit the complaint to arbitration. The cost of arbitration shall be shared equally by the employee and the state of Indiana. The commissioner of labor shall prepare a list of three (3) impartial individuals trained in labor relations, and from this list each party shall strike one (1) name. The remaining arbitrator shall consider the issues which were presented to the commission and shall afford the parties a public hearing with the right to be represented and to present evidence. The arbitrator's findings and recommendations shall be binding on both parties and shall immediately be instituted by the commission.

[62]*Id.*

[63]*Id.* §§ 34-4-2-1 to -19.

[64]*Id.* §§ 4-22-1-1 to -30.

[65]413 N.E.2d at 304.

[66]Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974).

[67]413 N.E.2d at 304.

[68]*Id.* at 304-05 (citing County Council v. Department of Pub. Welfare, 400 N.E.2d 1187, 1190 (Ind. Ct. App. 1980)).

State Department of Administration v. Sightes[69] involved an arbitration award issued under the same state employee statutory grievance procedure[70] as was involved in *Wagner*. The grievants in *Sightes* were teachers employed at the Indiana State Prison. By statute, the prison was required to provide a salary schedule for teachers "equal to that of the largest school system in the county of location."[71] The arbitrator ruled that this statute required the state to compute teacher income on the basis of public school teachers' hourly rates rather than annual salaries and awarded back pay in accordance with this decision.[72]

Under the UAA, an action to vacate an arbitrator's award must be filed within ninety days after the award is mailed,[73] and an action to confirm an arbitrator's award can not be filed until after expiration of that ninety-day period.[74] After the state had waited longer than ninety days without complying with the award, the teachers brought this action to confirm and enforce the award. Moreover, after the ninety-day period had expired, two other arbitrators issued decisions addressing other grievances, the first involving teachers in the same prison who had not been parties to the *Sightes* arbitration and the second involving teachers in different systems. Both these arbitrators declined to follow the *Sightes* arbitration award, reasoning in the former case that the state's interpretation of the statute calling for equal daily salary was permissible and, in the latter, that "salary" was not synonymous with "hourly rate of pay."[75]

The state argued that: (1) the court had to consider these two arbitration decisions which were in conflict with the award in this case, and (2) enforcement of the award in this case would require the state to violate the statutory requirement that teachers be paid equally.[76]

The court ruled that:

> The role of an appellate court in reviewing an arbitration award is limited to determining whether the defendant has established any of the grounds for challenge permitted by the Uniform Arbitration Act—in this case, the grounds for vacating an award provided in IC 34-4-2-13 . . . . Further-

---

[69]416 N.E.2d 445 (Ind. Ct. App. 1981).

[70]IND. CODE § 4-15-2-35 (1976).

[71]*Id.* § 11-1-1.1-30 (repealed effective Oct. 1, 1980).

[72]416 N.E.2d at 447.

[73]IND. CODE § 34-4-2-13 (1976).

[74]*Id.* § 34-4-2-12.

[75]416 N.E.2d at 447.

[76]*Id.* at 449.

> more, a defendant who has a valid ground for challenging an award but who fails to raise that challenge within the 90 day time limit should not be permitted to raise that challenge when the plaintiff applies for confirmation of his award . . . . The state did not avail itself of its statutory remedies prior to the teachers' application for confirmation of the [arbitrator's] award.[77]

The court also held that the lower court was correct in not taking into account the later conflicting arbitration awards and that the state had failed to timely raise its defense of illegality in being bound by an arbitrator to pay the teachers in this case differently from other teachers. The court enforced the arbitrator's award.[78]

In short, the *Wagner* and *Sightes* cases establish the applicability of the UAA to public employer-employee disputes under statutory grievance procedures. *Wagner* holds that such statutory arbitration is not an unconstitutional delegation of legislative authority.[79] *Sightes* establishes that defenses to enforcement of such arbitration awards must be raised in court within ninety days after the mailing of the award or they can not be considered by the court.[80] Interestingly, in *Sightes* the court applied this rule even to defenses which could not have been raised within the ninety-day period because the conflicting arbitration awards did not issue until that period had expired. These two cases solidly establish the UAA as the sole source of appeal from an enforcement of such arbitrators' awards.

2. *Private Employer Arbitration Cases.—Chauffeurs, Teamsters, Warehousemen and Helpers Local 135 v. Jefferson Trucking Co.*[81] involved an action under section 301 of the LMRA to enforce an arbitration award under a collective bargaining agreement. The Seventh Circuit held, as did the *Sightes* court, that under the Indiana Uniform Arbitration Act, an unsuccessful party in arbitration must file a motion to vacate within the ninety-day period or be barred from prosecuting its claim to invalidate the award.[82] The court of appeals also held that the UAA statute of limitations was enforceable in derogation of the common law rule that statutes of limitations do not run against pure defenses.[83] In this regard the court reasoned that section 301 actions are statutory actions and because "the

---

[77]*Id.* at 450 (citations omitted).
[78]*Id.*
[79]413 N.E.2d at 304.
[80]416 N.E.2d at 450.
[81]628 F.2d 1023 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 942 (1981).
[82]*Id.* at 1026-27 (citing IND. CODE §§ 34-4-2-12 to -13 (1976)).
[83]628 F.2d at 1027.

statute giving the right fixes the time period within which the right may be enforced, the time so fixed becomes a limitation on such right."[84]

In *Indianapolis Public Transit Corp. v. Transit Local 1070*,[85] the court of appeals enforced an arbitrator's award and rejected the employer's defense that the neutral arbitrator of a tripartite arbitration board had refused to grant it a continuance and had proceeded with the hearing in the absence of the employer's arbitrator over the employer's objection.

The UAA provides as one ground for vacating an arbitrator's award the arbitrator's refusal to postpone the hearing upon sufficient cause being shown.[86] Despite this language of the UAA, the court found that the central issue in this case was whether the employer was prejudiced substantially by the arbitrator's decision to proceed with the hearing in the absence of the employer's arbitrator.[87] The court noted that only the employer presented evidence during the employer arbitrator's absence, that the employer's arbitrator was present for the presentation of critical evidence with which he was unfamiliar, that counsel represented the employer in presenting the case, and that the employer arbitrator had the transcript of the hearing and participated in all the subsequent negotiations and executive sessions. Under these facts the court stated it could not see how the employer had been substantially prejudiced by the neutral arbitrator's actions and thus upheld the trial court's decision granting summary judgment in favor of the union.[88]

Under this series of cases, it is clear that the UAA will establish the procedural rules for judicial review for both public and private employee arbitration cases. Defenses to arbitration awards under the UAA must be raised within ninety days of the mailing of the award or they will be barred.[89] Under *Indianapolis Public Transit*, procedural defenses which are within the stated grounds for vacating an arbitrator's award under the Act which are timely raised will serve as the basis to set aside the award only if the arbitrator's pro-

---

[84]*Id.* (citing Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 466 (1957) (Frankfurter, J., dissenting)).

[85]414 N.E.2d 966 (Ind. Ct. App. 1981).

[86]IND. CODE § 34-4-2-13(a)(4) (1976).

[87]414 N.E.2d at 969. The court noted that "the issue is not whether Chairman Loretz could have granted a continuance, nor simply whether he erred in failing to do so, but rather whether such error, if any, prejudiced substantially Transit's rights." *Id.*

[88]*Id.*

[89]Chauffeurs, Teamsters, Warehousemen, and Helpers Local 135 v. Jefferson Trucking Co., 628 F.2d 1023 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 942 (1981); Department of Admin. v. Sightes, 416 N.E.2d 445 (Ind. Ct. App. 1981); Wagner v. Kendall, 413 N.E.2d 302 (Ind. Ct. App. 1980).

cedural error substantially prejudiced the party seeking to set aside the award.[90]

D. Unemployment Compensation

In *Thomas v. Review Board*,[91] the United States Supreme Court overturned the Indiana Supreme Court's interpretation and application of the disqualifying provisions of the Indiana Employment Security Act.[92] The Court held that the Act could not constitutionally be construed to deny unemployment benefits to an employee who quits his employment because of his religious beliefs.[93]

The facts underlying this case are important to an understanding of its significance. Thomas was initially hired to work in a roll foundry fabricating steel for general industrial use. When the foundry closed, he was transferred to a department which fabricated turrets for tanks. Thomas, a Jehovah's Witness, was concerned about whether working on weapons was contrary to his religious beliefs. Despite a fellow employee Jehovah's Witness' opinion that working on weapons was not "unscriptural", Thomas concluded that he could not work on weapons without violating his religious beliefs and voluntarily terminated his employment. At the unemployment compensation hearing, Thomas explained that he could, in good conscience, engage indirectly in the production of materials that might be used ultimately to fabricate arms as he had in the roll foundry.[94]

The Indiana Supreme Court upheld the Security Division's denial of unemployment benefits to Thomas and concluded first that Thomas' belief was more a philosophical choice than a religious belief and, alternatively, that even if Thomas quit for religious reasons, he would not be entitled to benefits under the Indiana Act because a termination motivated by religion is not for "good cause" objectively related to the work.[95]

The Supreme Court based its reversal of the Indiana court's decision on *Sherbert v. Verner*,[96] noting that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection."[97] The court noted that Thomas had drawn a line between direct and indirect production of weapons and that it was not for the courts to say what was a reasonable

---

[90]414 N.E.2d at 969.
[91]49 U.S.L.W. 4341 (April 6, 1981).
[92]IND. CODE § 24-4-15-1 (1976).
[93]49 U.S.L.W. at 4345.
[94]*Id.* at 4342.
[95]Thomas v. Review Bd., 391 N.E.2d 1127, 1131 (Ind. 1979).
[96]374 U.S. 398 (1963).
[97]49 U.S.L.W. at 4343.

line.[98] The court also found the contrary opinion of the other employee Jehovah's Witness not to be controlling, noting that "the guarantee of free exercise is not limited to beliefs which are shared by all members of a religious sect."[99] The court defined the "narrow function of a reviewing court in this context" as being "to determine whether there was an appropriate finding that the [employee] terminated his work because of an honest conviction that such work was forbidden by his religion."[100] On this record the court concluded that Thomas had terminated his employment for religious reasons.[101]

Relying upon *Sherbert*, the court concluded that a person could not be denied unemployment compensation for quitting work because his work became religiously objectionable.[102] The court noted that:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by a religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[103]

Another significant unemployment compensation case during the survey period was *Warner Press, Inc. v. Review Board*,[104] in which the court of appeals upheld established precedent permitting striking claimants to recover unemployment benefits for periods after their employer has hired replacements to restore or continue its operations. In this case the employer hired replacements for the strikers and contined its operations virtually unaffected by the strike. The Employment Security Act provides in pertinent part as follows: "An individual shall be ineligible for waiting period or benefit rights: for any week with respect to which . . . his . . . unemployment is due to a stoppage of work which exists because of a labor dispute . . . ."[105]

The court in *Warner Press* focused on the meaning of "stoppage of work." The court followed ample Indiana and out-of-state prece-

---

[98]*Id.*
[99]*Id.*
[100]*Id.* at 4344.
[101]*Id.*
[102]*Id.*
[103]*Id.*
[104]413 N.E.2d 1003 (Ind. Ct. App. 1980).
[105]IND. CODE § 22-4-15-3 (1976 & Supp. 1981).

dent[106] in concluding that "stoppage of work" meant a cessation or substantial curtailment of the employer's business rather than the cessation of an individual employee's labor.[107] As the employer's operations were not substantially curtailed by the strike because of its success in hiring replacements, the court held that there was no "stoppage of work" within the meaning of the Act and that the claimants were not barred from obtaining benefits by this portion of the Act.[108] Judge Hoffman concurred, relying upon *Jackson v. Review Board*[109] which he found to be directly on point.[110] Judge Garrard dissented, recognizing that *Jackson* was on point, but contending that it had been wrongly decided.[111]

E. Strike Injunction Enforcement

Bottoms v. B & M Coal Corp.[112] involved a contempt action for violations of a restraining order issued during a period of intense and occasionally violent labor strife in southern Indiana. B & M Coal was a non-union coal loading facility which operated during a United Mine Workers' strike. When its drivers were harassed by union members, B & M sought a temporary restraining order (TRO) and injunction from the trial court. The trial court issued a TRO forbidding members of the UMW to harass or impede B & M drivers. An amended TRO was issued which limited the union to three pickets per site. Copies of the TRO were served on the UMW district headquarters and its attorney. The TRO was read to striking miners at various coal mines by the local sheriff, and copies were passed out to strikers.

A month later, 400-500 strikers "raided" the B & M coal-loading facility. The raid occurred at night, and the strikers were heavily armed. Before the police arrived, over $173,000 in damages had been inflicted upon B & M equipment and vehicles. The sheriff and a deputy observed the entire incident from a nearby unmarked car. State police were called in and roadblocks were set up to stop the raiders. One hundred and ninety-one men were thus arrested and were named individual defendants together with the union in this contempt action.[113]

---

[106]*See, e.g.*, Jackson v. Review Bd., 138 Ind. App. 528, 215 N.E.2d 355 (1966); Carnegie-Illinois Steel Corp. v. Review Bd., 117 Ind. App. 379, 72 N.E.2d 662 (1947); Annot., 61 A.L.R.3d 693 (1975).

[107]413 N.E.2d at 1005-06.

[108]*Id.*

[109]138 Ind. App. 528, 215 N.E.2d 355 (1966).

[110]413 N.E.2d at 1006 (Hoffman, J., concurring).

[111]*Id.* at 1007 (Garrard, J., dissenting).

[112]405 N.E.2d 82 (Ind. Ct. App. 1980).

[113]*Id.* at 86-87.

The trial court held both the union and the 191 men in contempt of the TRO and ordered them to pay B & M damages, stating that if they failed to pay the damages within ten days, each defendant would be sent to jail until the damages were paid in full.[114]

The court of appeals deleted the incarceration order in the event that damages were not paid within ten days as an unlawful "predetermination of a penalty for noncompliance."[115] It upheld service of the TRO on the 191 individual defendants, recognizing the general rule that a TRO must be served on the person or persons restrained but finding that the instant individual defendants fell under an exception to that rule as there was ample proof that they had actual knowledge of the restraining order.[116]

The court dismissed the union as a defendant because there was no evidence that it, as a separate entity, was a participant in the raid. No union officers or employees were among those arrested or shown to be present at the raid. The court followed the rule that a union may be held liable only under the traditional doctrines of agency.[117] In contrast, however, the court found ample evidence that the 191 individual defendants were organized and acted jointly in conducting the raid and that their actions caused the damages B & M incurred from the raid.[118] Finally, the court remanded the case for reconsideration of some of the damages assessed by the trial court against the defendants which it found unsupported by the record.[119]

Bottoms establishes the civil contempt action as a viable means for collecting damages from violent strikers. Success in such an action will hinge upon care in assuring that potential defendants are served notice of the provisions of the restraining order or at least that all those who may violate the order can be established as having had actual knowledge of the order.

---

[114]*Id.* at 87.

[115]*Id.* at 88 (citing Thomas v. Woollen, 255 Ind. 612, 266 N.E.2d 20 (1971); Caito v. Indianapolis Produce Terminal, 162 Ind. App. 590, 320 N.E.2d 821 (1974)).

[116]405 N.E.2d at 89 (citing Shaughnessey v. Jordan, 184 Ind. 499, 111 N.E. 622 (1916); IND. R. TR. P. 65(D)).

[117]405 N.E.2d at 90 (citing United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966); Mason-Rust v. Laborers Int'l Union Local 42, 435 F.2d 939 (8th Cir. 1970)).

[118]405 N.E.2d at 91.

[119]*Id.* at 96.

XII. Products Liability

JOHN VARGO*

A. *Introduction*

During this survey period, several cases have shed light on some unresolved issues concerning Indiana products liability law. However, the most significant case was the Indiana Supreme Court decision in *Dague v. Piper Aircraft Corp.*[1] The court in *Dague* upheld the ten year statute of limitations of the recent Indiana Products Liability Act. It now seems clear that no action for a defective product may be commenced after ten years from the date of delivery of the product to its initial user. In essence, no action lies for products that are ten years or older.[2]

---

*Member of the Indiana Bar. B.S., Indiana University, 1965; J.D., Indiana University School of Law—Indianapolis, 1974.

[1]418 N.E.2d 207 (Ind. 1981).

[2]In the context of *Dague*, it seems relevant to explore the background of the enactment of the Indiana Products Liability Act, IND. CODE §§ 33-1-1.5-1 to -8 (Supp. 1981), and its relation to the almost explosive controversies which surround this type of legislation, either proposed or enacted, throughout the country.

During the mid-1970's, the federal government and various state legislatures were confronted with testimony that there was a "crisis" in products liability. This crisis developed when insurance carriers raised premiums substantially for their insureds who were seeking insurance coverage for product related accidents. The insurance companies and their insureds alleged that the need for the greatly increased premiums resulted from: (1) a tremendous increase in the number of claims and suits related to products; (2) a large increase in the amount of awards and settlements paid on product related claims; and (3) a breakdown in the tort system that favored the injured party over the manufacturer or seller of products. *See generally Product Liability Insurance: Hearings on S. 403 before the Sub-comm. for Consumers of the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong. 1st Sess. (1977) [hereinafter cited as *S. 403 Hearings*]; U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT I-3, I-4 (1978) [hereinafter cited as TASK FORCE REPORT]. Based upon these allegations, certain product manufacturers and their insurance carriers attempted to convince the federal government and state legislatures to remedy the situation with statutory tort reforms. This alleged products liability crisis thus followed the course of the alleged medical malpractice crisis of a few years earlier. *See* Bernzweig, *Some Comparisons Between the Medical Malpractice and Products Liability Problems*, in U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, SELECTED PAPERS 418 (1978). During both the medical and product liability crises, neither the insurance companies nor their insureds ever suggested that the increased premiums might have resulted from the degree of care exercised by physicians or the number of defective products on the market. *Id.*

If the allegations of the insurance companies and their insureds were true, a sound financial and statistical basis for increased premiums should have been available. But no real evidence of greatly increased claims or costs was ever produced to substantiate an actual crisis in the products liability area. TASK FORCE REPORT, *supra*,

B. *The* Dague *Case*

John Dague was killed on July 7, 1978 when his aircraft crashed. His widow brought an action in federal district court for wrongful death on October 1, 1979 alleging that her husband's death was a result of defects in the aircraft manufactured by the defendant, Piper Aircraft. The airplane was manufactured and placed into the stream of commerce in March of 1965, more than ten years before the accident took place. Piper moved for summary judgment based upon Indiana Code section 33-1-1.5-5 which provides:

> This section applies to all persons regardless of minority or legal disability. Notwithstanding IC 34-1-2-5, any product liability action must be commenced within two [2] years after the cause of action accrues or within ten [10] years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight [8] years but not more than ten [10] years after that initial delivery,

---

at xxxiv-xliv; Kronzer, *Jury Tampering—1978 Style*, 10 St. Mary's L.J. 399, 410-15 (1979). Instead, the insurance carriers instigated a multi-million dollar advertising program that attacked the tort and jury system and flooded the federal and state legislatures with material which supported their allegations concerning the cause of this "crisis." *Id.*

It was asserted as "fact" that the number of product liability claims and/or suits had increased from about 50,000 per year in the 1960's to almost a million per year in the mid-1970's. *See*, Subcommittee on Capital, Investment and Business Opportunities, Product Liability Insurance, H.R. Rep. No. 95-997, 95th Cong., 2d Sess. 38 (1978); Geisel, *Horror Story Ads Untrue?—Can't Prove Mower, Claims Assertions*, 11 Bus. Ins. 1, 66 (1977). This claim was published in the Insurance Information Institute's edition of *Insurance Facts* and was widely distributed to, among others, the Indiana legislature and the news media, prior to the enactment of the Indiana Products Liability Act. *See* materials held by publisher. The "one million" figure was given in speeches by officials of the American Insurance Association including its president, who stated that "the strict liability concept ignited an explosion of product *lawsuits* from 50,000 in 1960 to 500,000 in 1970 to perhaps a million today". Geisel, *Horror Stories*, *supra*, at 66.

The "one million" figure was incorrect. The actual figure for the number of *claims*, *not lawsuits*, during the alleged crisis was found to be in the range of 60,000 to 70,000 per year. *Id.* Although the "one million" figure was false, some insurance companies continued to use the figure in their advertising campaigns.

Along with the false "one million" figure "horror stories" were also cited as a cause of increased premiums. Horror stories were examples of cases in which a claimant brought suit and recovered on a set of circumstances which made it quite obvious that the person did not deserve to recover. One well-known example involved a man who picked up a lawn mower to trim a hedge, was injured, and successfully sued the manufacturer of the lawn mower. This "lawn mower" story, however, has no basis in fact. *Id. See generally* Kronzer, *Jury Tampering*, *supra*, at 409-10.

Finally, the assertion that the claimant almost always wins a product liability action and is awarded an astronomical sum is simply not true. *See id.* at 411-13.

> the action may be commenced at any time within two [2] years after the cause of action accrues.[3]

The district court granted the defendant's summary judgment motion and dismissed the plaintiff's action. The plaintiff appealed to the Seventh Circuit Court of Appeals. Pursuant to Indiana Appellate Rule 15(o), questions concerning the statute of limitations of section 5 of the Products Liability Act were certified by the Seventh Circuit to the Indiana Supreme Court.[4] The Indiana Supreme Court found all certified questions in favor of the defendant and determined that section 5 barred the plaintiff's action.[5]

1. "Or."—The plaintiff contended that the disjunctive word "or" in section 5 allowed her to bring the action at any time within two years of the accrual of the cause of action without reference to the latter portion of section 5 which referred to a ten year limitation. The Indiana Supreme Court stated that it was required to construe the statute in accordance with the apparent intent of the legislature.[6] The court found that the legislature intended to limit the time within which the action could be brought to ten years after a product is first delivered to the initial user or consumer.[7] The *Dague* court stated that although the statute did contain "or," this was not dispositive because a literal reading of the disjunctive would render the latter portion of section 5 meaningless.[8] Referring to the court of appeals' decision of *Amermac*[9] and to "logic," the supreme court literally rewrote the statute and replaced the "or" with an "and."

2. Failure to Warn.—The plaintiff in *Dague* alleged that even if section 5 required that an action be brought within both the two and ten year periods, the action should not be barred.[10] The plaintiff argued that since the defendant had a continuing duty to warn and since there was no warning, the action survived.[11] In other words, the duty to warn is a general duty not necessarily related to a products action. The *Dague* court rejected plaintiff's contention and stated that the definition section of the Product Act included both negligence and strict liability actions.[12] Thus the Act would extend *to all actions sounding in tort.*[13]

---

[3]IND. CODE §33-1-1.5-5 (Supp. 1981).
[4]418 N.E.2d at 209.
[5]*Id.* at 211.
[6]*Id.* at 210.
[7]*Id.*
[8]*Id.* at 211.
[9]Amermac, Inc. v. Gordon, 394 N.E.2d 946, 948 n.4 (Ind. Ct. App. 1979).
[10]418 N.E.2d at 211.
[11]*Id.*
[12]*Id.* at 212.
[13]*Id.*

The *Dague* court's decision that a failure to warn will not give rise to an action when the product is over ten years of age regardless of its nature is harsh and unresponsive to public policy and logic. The fundamental policy of tort law, of course, is to properly compensate innocent victims. Paramount in tort law, however, is the safety incentive rationale. As has been stated, "[t]he fence at the top of the cliff is better than an ambulance in the valley below."[14] The *Dague* court's deference to legislative enactment disregards the court's interpretive role in the light of threats to the public's safety. Assume, for example, that an airplane is over ten years of age and that as a result of new technology a highly dangerous defect is discovered in the structure. According to *Dague*, there is absolutely no duty to warn or to do anything else. If the situtation arises in which a defendant manufacturer did not originally have a duty to warn but later knowledge or information gives rise to such a duty, it is now better for such defendants to remain silent and to do nothing to remedy the danger.

The *Dague* decision would thus have comported better with the safety of the public if the court had simply stated that actions based on duties which arose concerning the original manufacture or design would be barred after ten years. An exception to such bar would be a continuing duty to warn, or at least duties that arise within ten years of the date of plaintiff's injury. In this manner, there would be no conflict with the intent of the legislature. The major complaints of industry were that it is unfair to hold the manufacturer liable because of the *use* of a machine over a period of years. After a specific number of years, it was believed that the injury was produced by something other than the acts of the product's manufacturer. In many product liability actions, certain duties arise under negligence law that are unrelated to the original date of design and maufacture. For such later arising duties, it seems illogical to bar an action merely because the product itself is ten years old.

3. The Due Process Claim.—The plaintiff in *Dague* alleged that the Products Liability Act was violative of article 1, section 12 of the Indiana Constitution in that it barred a claim without providing an affirmative remedy. The *Dague* court made short work of the article 1 argument by stating that the legislature has the power to modify common law remedies.[15] Since the plaintiff had no vested property rights and such an action was not a fundamental right, the

---

[14]*S. 403 Hearings, supra* note 2, at 331 (statement of Professor Thomas F. Lambert, Jr.). Indiana recognizes that one of the major policy bases for strict liability is the safety incentive rationale. *See* Conder v. Hull Lift Truck, Inc., 405 N.E.2d 538, 546 (Ind. Ct. App. 1980).

[15]418 N.E.2d at 213.

remedy could be eliminated within the confines of the Indiana Constitution.[16]

Recently the New Hampshire Supreme Court has struck down its medical malpractice legislation using an intermediate level of scrutiny.[17] Such an approach by the Indiana Supreme Court in *Dague* could have given different results and added vitality to article 1, section 12. Florida, whose constitution is relevantly similar to Indiana's struck down a similar Products Liability Act.[18]

4. The Indiana Courts and the Products Liability Act Are "One Subject Matter".—The *Dague* court rejected the plaintiff's claim that article 4, section 19 of the Indiana Constitution was violated by the Product Act. Article 4, section 19 confines statutes to one subject matter. The supreme court, applying a very liberal interpretation of "reasonableness," found that the twenty-seven sections of the Act concerning the operation and jurisdiction of various Indiana courts were sufficiently related to the one section of the Act concerning products liability law.[19] With the supreme court's interpretation of "one subject matter," the legislature is free to join almost any combination of subjects within a statute with little likelihood that a constitutional challenge will prevail.

C. Defenses and Bars to Recovery

1. Statute of Limitations.—Several other Indiana decisions discussed a variety of issues concerning the statute of limitations. In *Dodd v. Kiefer*,[20] the Indiana Court of Appeals determined that Indiana Code section 34-4-20-2 limited the time within which actions could be brought for improvements to real estate to ten years from the date of "substantial completion" of the improvement.[21] On cross error, the plaintiff raised the issue that the time limitations contained in Indiana Code sections 34-1-2-1 and 34-1-2-2 should control over the ten year statute of limitations. Thus, the plaintiff contended that he should be given six or two years from the date the *cause of action accrued* irrespective of the ten year outer cut-off limit of Indiana Code section 34-4-20-2. The court of appeals rejected this argument and said that the real property statute was very broad in application and included products liability actions.[22]

---

[16]*Id.*

[17]Carson v. Maurer, 424 A.2d 825 (N.H. 1980).

[18]Diamond v. E.R. Squibb and Sons, Inc., 397 So.2d 671 (Fla. 1981) (citing Overland Constr. Co. v. Sirmons, 369 So.2d 572 (Fla. 1979)).

[19]418 N.E.2d at 214-15.

[20]416 N.E.2d 463 (Ind. Ct. App. 1981).

[21]*Id.*

[22]*Id.*

The decision in *Dodd* raises a very important issue concerning the application of statutes of limitations when there are conflicting time limits in two or more statutes that apply to a specific factual setting. For instance, suppose Indiana Code section 34-4-20-2 contained an eight year limitation period. Would the *Dodd* court then apply the ten year period of the Products Liability Act or the eight year period of the improvement to realty statute?

In *Lane v. Barringer*,[23] Lane brought an action in negligence, strict liability, and implied warranties in contract for injuries she received. The injuries were sustained when Lane's daughter, while shopping with Lane, dropped a bottle of drain cleaner which broke and splashed drain cleaner on Lane's legs. Lane did not bring the action until more than two years after the accident. Consequently, the trial court dismissed the negligence and strict liability counts because of the two year limitation period.[24] The court implied that the four year statute of limitations contained in the U.C.C. controlled the contracts count, but dismissed this count on other grounds.[25]

Indiana has now developed two limitation periods for product liability actions. The first limitation is the two year statute of limitations from the time of occurrence. This limitation period is further restricted by an outside limitation of ten years from the date of delivery of the product.[26] In implied warranty actions involving the U.C.C., the four year statute of limitations from date of delivery appears to control,[27] and the ten year limitation of the Product Act does not have any application.[28]

2. Privity.—The *Lane* court, when confronted with a U.C.C. contract suit for personal injuries, determined that vertical and horizontal privity barred the plaintiff's action.[29] Lane brought the action for her injuries against the manufacturer and supplier of the allegedly defective product. Assuming that a "sale" of the product to the daughter had occurred there would be no privity between

---

[23]407 N.E.2d 1173 (Ind. Ct. App. 1980), *transfer denied*, Nov. 21, 1980.

[24]*Id.* at 1174 (citing IND. CODE §34-1-2-2 (Supp. 1981)).

[25]*Id.* at 1174-75 (citing IND. CODE §26-1-2-725 (1976)).

[26]Dague v. Piper Aircraft Corp., 418 N.E.2d 207 (Ind. 1981).

[27]IND. CODE §26-1-2-725 (1976).

[28]There is a specific exclusion of breach of warranty actions in IND. CODE §33-1-1.5-1 (Supp. 1981); *see also* Dague v. Piper Aircraft Corp., 418 N.E.2d 207 (Ind. 1981).

[29]Though the court did not use the terms "vertical" or "horizontal" privity, it in essence discussed both. For an explanation of the differences between vertical and horizontal privity, see Vargo, *Products Liability, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 270 n.12 (1975) [hereinafter cited as Vargo, *1975 Products Survey*].

Lane and the remote manufacturer and supplier, since there was no vertical privity between the daughter and those same entities.[30] Thus, the court determined that the mother's potential third party beneficiary action against the remote suppliers was barred. As to the action against the retailer, the court stated that while the daughter arguably had "vertical" privity with the retailer the retailer had not been properly joined in the action and the question of the retailer's liability was not before the court.[31]

Concurring in the result,[32] Judge Ratliff stated that he disagreed with the federal court's precedent that required privity in U.C.C. implied warranty actions for personal injuries.[33] Judge Ratliff stated that the modern trend is to reject the privity requirement in personal injury actions.[34] In the instant case, however, the mother should be deprived of recovery because she lacked "horizontal" privity with her daughter as required under Indiana Code section 26-1-2-318.[35]

Indiana seems to have differentiated between implied warranties which sound in contract and those which sound in tort.[36] If the warranty action is in tort, no privity is required, but if the action is brought pursuant to the U.C.C., then *both* horizontal and vertical privity are required.[37] Judge Ratliff's opinion suggests that the supreme court might find that in personal injury actions, vertical privity is not required.

3. Contributory Negligence and Problems of Proof.—In *Pardue v. Seven-Up Bottling Co. of Indiana*,[38] the court of appeals affirmed a judgment adverse to the plaintiff. The plaintiff alleged that the trial

---

[30]407 N.E.2d 1173, 1175 (Ind. Ct. App. 1980), *transfer denied*, Nov. 21, 1980. Vertical privity as used by the court was the contractual nexus between the daughter and the seller of the product. Since the daughter had no contractual relation to the "remote" parties in the stream of commerce, there was no privity.

[31]The actual owners and operators of the retail store who sold the product were either dismissed or were not proper parties to the action because of improper service. *Id.* at 1176.

[32]Judge Ratliff actually dissented in part and concurred in part. *Id.* at 1176-78.

[33]*Id.* at 1176. Two Southern District of Indiana decisions have concluded that privity is required in personal injury actions brought under a U.C.C. theory. *See* Neofes v. Robertshaw Controls Co., 409 F. Supp. 1376 (S.D. Ind. 1976); Withers v. Sterling Drug, Inc., 319 F. Supp. 878 (S.D. Ind. 1970).

[34]407 N.E.2d at 1177-78.

[35]Horizontal privity is the contractual nexus between the daughter (buyer) and other parties. As Judge Ratliff explains, Indiana has adopted the most restrictive approach in horizontal privity by adopting option A to U.C.C. § 2-318. 407 N.E.2d at 1178.

[36]For a discussion of implied warranties in tort and implied warranties in contract, see Vargo, *1975 Products Survey*, *supra* note 29, at 273-74.

[37]*Id.* at 274.

[38]407 N.E.2d 1154 (Ind. Ct. App. 1980).

court erred when it submitted instructions on contributory negligence since there was a complete absence of evidence of any contributory negligence. The *Pardue* court found that the contributory negligence instruction was, at most, harmless error since the plaintiff did not present a prima facie case of negligence.[39] In dissent, Judge Ratliff stated that there was a sufficient factual basis to establish negligence on the defendant's part.[40] Since such inferences could present a jury question on the defendant's negligence, the contributory negligence instruction would have been prejudicial error.

D. Foreseeability and Component Parts

In *Shanks v. A.F.E. Industries, Inc.*,[41] the Indiana Supreme Court vacated the court of appeals' decision and reinstated the trial court's judgment on the evidence in favor of the defendant. The supreme court's decision in *Shanks* was in part based upon an analysis of foreseeability. In essence, the defendant in *Shanks* was the manufacturer, designer and seller of a component part (grain dryer) of a system (grain elevator).[42] The system was built and designed by parties other than the defendant. The supreme court examined in great detail the roles of the various parties in the overall design of the system and concluded that since the defendant did not foresee the precise manner in which the system was designed and built, the defendant should not be held liable for design defects in the component part or for failure to equip the component with warnings or warning devices.[43]

The court of appeals had determined that, although the defendant was not liable for a failure to warn, the defendant's component part was itself defective because of a failure to provide warning devices.[44] The court of appeals' rule concerning warning devices was well-reasoned and would probably have been a leading case nationally if it had not been vacated by the Indiana Supreme Court.[45] The

---

[39]*Id.* at 1159. The court noted that the plaintiffs did not attempt to rely upon res ipsa loquitur, *id.* at 1158; however, the use of res ipsa probably would not have assisted the plaintiffs because of the highly restrictive and illogical requirment that the defendant have control of the injuring instrumentality at the time of the accident. *See* Vargo, *1975 Products Survey*, *supra* note 29, at 276-78.

[40]407 N.E.2d at 1159-60.

[41]416 N.E.2d 833 (Ind. 1981).

[42]For factual details, see *id.* at 834-36 (court of appeals' factual summary adopted by the supreme court).

[43]*Id.* at 837.

[44]*See* Shanks v. A.F.E. Industries, Inc., 403 N.E.2d 849, 857-58 (Ind. Ct. App. 1980), *vacated*, 416 N.E.2d 833 (Ind. 1981).

[45]The appellate court noted that at least three types of defects may give rise to liability under § 402A: manufacturing, design, and failure to warn. 403 N.E.2d at 855.

supreme court's finding of unforseeability is difficult to understand because the supreme court adopted the court of appeals' finding that the defendant had designed, manufactured, advertised and sold the part (dryer) "with the contemplation and representation that it could be used in conjunction with such equipment" (the system).[46] If the court's reasoning depended upon the view that foreseeability requires that the precise hazard or exact consequences which were encountered should have been foreseen, then the supreme court's decision contravenes all generally recognized concepts of foreseeability in tort law[47] and prior Indiana decisions.[48] If the *Shanks* court's decision was based upon an intervening or superseding cause because of the system designs choices, then foreseeability would not be an issue.[49] Determinations of foreseeability concerning system design responsibility and component part responsibility in any particular set of circumstances such as *Shanks* probably present policy issues and nothing more.[50]

The court's concept of warning "devices" can be construed as either a fourth type of defect or as a subclass of the design or failure-to-warn types of defects. Thus, Indiana could have been a leading jurisdiction in its concept of "defect" in strict liability cases. The addition of warning devices to mismanufacture, misdesign and failure-to-warn types of defects would have established an additional basis for liability for injured parties. If the appellate court intended the warning "device" concept to be merely an augmentation to design or failure-to-warn cases, it would still have expanded liability under the terminology of those cases.

Although the court of appeals' opinion was vacated, it seems that this was done because of the difference of opinion between the supreme court and court of appeals concerning foreseeability and *not* the warning device issue. Thus, the reasoning of the court of appeals concerning warning devices would still be applicable. In support of the preservation of the warning device rationale is Gilbert v. Stone City Constr. Co., 171 Ind. App. 418, 426-29, 357 N.E.2d 738, 744-45 (1976). In addition, the Seventh Circuit Court of Appeals has adopted some of the reasoning of the court of appeals in *Shanks*, *after* its being vacated by the Supreme Court of Indiana. *See* Lantis v. Astec Indus., Inc., 648 F.2d 1118 (7th Cir. 1981).

[46]416 N.E.2d at 836.

[47]*See* RESTATEMENT (SECOND) OF TORTS § 435 (1965).

[48]One of the more restrictive Indiana decisions which has discussed foreseeability has stated that "it is a generally accepted principle that foreseeability does not mean that the precise hazard or the exact consequences which were encountered should have been foreseen." Peck v. Ford Motor Co., 603 F.2d 1240, 1246 (7th Cir. 1979). However, the *Peck* court seems to have violated its own rule in making its decision on foreseeability. *See id.* at 1245-46 (examination of precise factors to conclude no foreseeability). *Peck* was also partially based upon a concept of "mere condition" which was rejected in the subsequent court of appeals case of Mansfield v. Shippers Dispatch, Inc., 399 N.E.2d 423 (Ind. Ct. App. 1980).

[49]*See* RESTATEMENT (SECOND) OF TORTS § 442B Comment a (1965).

[50]Prosser states that both proximate cause and foreseeability are policy issues. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41, at 237 (4th ed. 1971). Foreseeability is a question "of the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results." *Id.* § 43, at 250.

The court of appeals' decision, although vacated, may nevertheless not be without effect. In *Lantis v. Astec Industries, Inc.*,[51] the Seventh Circuit Court of Appeals cited with approval the court of appeals' decision in *Shanks*. The Seventh Circuit Court must have been fully aware of the vacation of the court of appeals' decision, because *Lantis* was decided after the Indiana Supreme Court's decision in *Shanks*. Thus, the Seventh Circuit must have cited the court of appeals' decision for its reasoning.

Lantis held that the seller of an unfinished product can be held liable if it anticipates or foresees the uses of the unfinished product.[52] The *Lantis* decision involved a pre-erected asphalt plant which was designed and assembled at the defendant seller's plant in Tennessee. The seller then disassembled the plant and shipped it to the buyer in Indiana where the plant was to be reassembled. Reassembly was to be performed by the purchaser's employees and the defendant seller was to supply drawings, instructions, and supervisors for the reassembly process. During the reassembly process, the plaintiff, an employee of the purchaser, fell through an open hole in a platform which would have been at least partially covered after final reassembly of the asphalt plant. The defendant admitted that it contemplated and indeed intended that the purchaser's employees use the platform during the reassembly.

The *Lantis* court determined that the component part of an unfinished or unassembled product is a product and that the seller is subject to liability under Restatement §402A.[53] *Lantis* distinguished *Lukowski v. Vecta Educational Corp.*,[54] which rejected liability for the seller of an unfinished product, because delivery had not been completed at the time of the accident. *Lukowski* held that an unfinished product did not meet the stream of commerce requirement of §402A.[55] *Lantis* held that in the instant case the seller anticipated that the unfinished product and its component part would be used during reassembly and that delivery took place at the time the buyer received the various components of the product.[56] Thus,

---

[51]648 F.2d 1118 (7th Cir. 1981).

[52]*Id.* at 1120.

[53]*Id.* at 1121-22.

[54]401 N.E.2d 781 (Ind. Ct. App. 1980), *transfer denied*, Nov. 25, 1980.

[55]*Id.* at 786. For an explanation of the "stream of commerce" approach, see Vargo, *1975 Products Survey*, *supra* note 29, at 275. The "stream of commerce" rationale rejects the concept of commercial sale and allows the plaintiff to bring his action against anyone in the commercial process who makes contact with the allegedly defective product.

[56]648 F.2d at 1121-22. It has been held that a product does not enter the stream of commerce until delivery has been accomplished. *See* Vargo, *Products Liability, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 202, 208-09 (1977) [hereinafter cited as Vargo, *1977 Products Survey*].

Lukowski was distinguishable on the grounds that in that case it was neither intended nor anticipated that the product would be used before final completion.

The *Lantis* decision clarifies the concepts of sale, stream of commerce, and delivery in situations involving both unfinished products and component parts of products. If there are foreseeable dangers during the assembly of a product, then the seller of the system or of the component may be held liable under §402A. This may be of great assistance in situations in which the product itself is over ten years of age but where a defective component is less than ten years of age. In such situations, the injured party could bring a products action against the seller of the component part and still comply with the ten year requirement of the Products Liability Act as interpreted by *Dague*.

E. Failure to Warn

The Indiana Supreme Court in both *Dague* and *Shanks* espoused the view that a failure to warn is a negligence theory.[57] In addition, the *Shanks* opinions by both the court of appeals and the supreme court accepted the proposition that a manufacturer could fulfill his obligation to warn by merely passing along information or warnings to the employer when an employee is injured by a defective product.[58] This rationale is based upon the concept that a manufacturer has "no control over the work space, the machine or the hiring, instruction or placement of personnel."[59] It then becomes the responsibility of the employer to post warnings and take other precautions.

This approach to "failure to warn" cases has its origin in *Burton v. L. O. Smith Foundry Products Co.*,[60] a Seventh Circuit decision in 1976. The same court, however, revised its approach to warning cases more than seven months after the *Burton* decision in *Reliance Insurance Co. v. Al E. & C. Ltd.*[61] In *Reliance*, the Seventh Circuit Court of Appeals held that it is the duty of the manufacturer to pro-

---

[57]The *Dague* opinion said that a failure to warn "is certainly a product liability action based on a theory of negligence." 418 N.E.2d at 212. The *Shanks* court said that "the test of the adequacy of a warning is whether it is reasonable under the circumstances." 416 N.E.2d at 837 (citing Ortho Pharmaceutical Corp. v. Chapman, 388 N.E.2d 541 (Ind. Ct. App. 1979)).

[58]Both the supreme court and court of appeals cited Burton v. L.O. Smith Foundry Products Co., 529 F.2d 108 (7th Cir. 1976) for the proposition that the obligation to warn can be fulfilled by informing the employer. *See* 416 N.E.2d at 837; 403 N.E.2d at 856-57.

[59]416 N.E.2d at 837.

[60]529 F.2d 108 (7th Cir. 1976).

[61]539 F.2d 1101 (7th Cir. 1976).

vide warnings in a form that will reach the ultimate consumer and inform him of the risks and that such a duty is non-delegable.[62]

The Indiana Supreme Court's decision to approach warning cases through the concept of negligence in *strict liability* cases does not seem to conform to well-reasoned opinions in other jurisdictions holding that the duty in negligence warning cases is inappropriate to strict liability warning cases.[63] In addition, the concept that the manufacturer can fulfill his obligation to manufacture a non-defective product by giving warning to an employer ignores several policies that underlie strict liability.[64] First, an employer has very little incentive to make his work place safe or to pass on warnings.[65] Second, an employer who acts wrongfully or negligently towards an employee is immune from tort sanctions.[66] If the employer and the manufacturer act wrongfully towards an injured employee, those wrongs should be considered the acts of joint tortfeasors and as such the manufacturer should not escape liability because of the wrongs of another.[67] Third, the manufacturer, as an expert in his field of endeavors, is in the best position to most economically guard

---

[62]*Id.* at 1106.

[63]There is a distinct difference between a failure to warn in strict liability and the duty to warn in negligence:

> In a strict liability case we are talking about the condition (dangerousness) of an article which is sold without any warning, while in negligence we are talking about the reasonableness of the manufacturer's actions in selling the article without a warning. The article can have a degree of dangerousness because of a lack of warning which the law of strict liability will not tolerate even though the actions of the seller were entirely reasonable in selling the article without a warning considering what he knew or should have known at the time he sold it.

Phillips v. Kimwood Machine Co., 269 Or. 485, 525 P.2d 1033, 1039 (1974). *See also* Vargo, *Products Liability in Indiana—In Search of a Standard for Strict Liability in Tort*, 10 IND. L. REV. 871 (1977) [hereinafter cited as Vargo, *Standard for Strict Liability*].

[64]For a summary of the policy reasons for the adoption of strict liability, see Vargo, *Standard for Strict Liability*, *supra* note 63, at 872 n.6.

[65]It is well accepted in Indiana that the exclusive remedy against an employer is contained in the Workmen's Compensation Act. *See* Kottis v. United States Steel Corp., 543 F.2d 22 (7th Cir. 1976), *cert. denied*, 430 U.S. 916 (1977); North v. United States Steel Corp., 495 F.2d 810 (7th Cir. 1974); Needham v. Fred's Frozen Foods, Inc., 171 Ind. App. 671, 359 N.E.2d 544 (1977). Thus, he has very little reason to attempt to employ safety measures because of economic reasons. *See* Vargo, *Workmen's Compensation, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 289, 294 (1974). The view that the exclusivity of Workmen's Compensation creates a situation of industrial disconcern is well recognized throughout the United States. *See* Phillips, *The Relationship Between the Tort System and Workers' Compensation—The True Cost* (May 27, 1981) (presented at the Fourth National Conference of the National Legal Center for the Public Interest) [hereinafter cited as Phillips, *The Tort System & Workers' Compensation*].

[66]Phillips, *The Tort System & Workers' Comepensation*, *supra* note 65, at 2.

[67]*Id.* at 15-16.

or make his product safe.[68] The necessity of guarding dangerous machines is based upon the recognition that human beings make errors and sometimes act imperfectly.[69] The manufacturers of such dangerous machines know, or should know, that such accidents are inevitable. Thus, guardings and warnings with respect to dangerous machines should be performed at the design and manufacturing stages.[70] The employer, who may have very little expertise or incentive to protect his employees, should not be relied upon to warn or guard against dangers. To say that the manufacturer has little control over a dangerous product merely because the product has been sold to an employer who has sole possession of such product disregards the proper extent of the manufacturer's duty at the design and manufacturing stages.[71]

In *Craven v. Niagara Machine & Tool Works, Inc.*,[72] a tool and die maker with 40 years of experience was severely injured when the dies of a punch press closed on his hand. The plaintiff was injured when he was testing or "trying out" a die he had just completed work upon. The plaintiff brought his action in strict liability in tort and at the close of all of the evidence, the trial court granted defendant's motion for judgment on the evidence.[73] On appeal, the trial court was reversed on the basis that there was sufficient evidence to present to the jury on the defendant's failure to warn.[74] The appellate court recognized that a product may be defective because of either a failure to warn or inadequate warnings.[75] The court then stated that where the danger or potential danger is *known or should be known* to the user the duty does not attach.[76]

---

[68]In Dias v. Daisy-Heddon, 390 N.E.2d 222, 227 (Ind. Ct. App. 1979) the court said manufacturers are charged with the knowledge of experts in their fields of interest. *See also* Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 847-48 (1962).

[69]The design and manufacture of guards for dangerous machines is a concept that is based upon the recognition that people will make mistakes:

> We think this case presents a situation where the interests of justice dictate that contributory negligence be unavailable as a defense to either the negligence or strict liability claims.
>
> The asserted negligence of plaintiff—placing his hand under the ram while at the same time depressing the foot pedal—was the very eventuality the safety devices were designed to guard against. It would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect against.

Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 412, 290 A.2d 281, 286 (1972).

[70]Phillips, *Standard for Defectiveness*, 46 U. CIN. L. REV. 101, 109 (1977).

[71]*Id.*

[72]417 N.E.2d 1165 (Ind. Ct. App. 1981).

[73]*Id.* 1168.

[74]*Id.* at 1172.

[75]*Id.* at 1169.

[76]*Id.* at 1169-70.

This final declaration seems incorrect. It defies the rationale of strict liability in tort.[77] The user's failure to discover or guard against the defect has always been considered the type of contributory negligence *that is not a defense to strict liability in tort.*[78] The concept that no warning is required when the danger is or should be known to the user defies the patent danger rule concept as espoused in most jurisdictions and in the recent Indiana case of *Bemis Co., v. Rubush.*[79] In addition, unreasonable assumption of risk, which *is* a defense in strict liability, is not automatically present merely because the danger is known.[80]

In sum, use of negligence rules in strict liability actions for a failure to warn results in the reinjection of contributory negligence and misapplication of assumption of risk that have been specifically rejected by almost all jurisdictions and prior Indiana decisions.[81]

F. Distinctions Among Theories

In *Midway Ford Truck Center, Inc. v. Gilmore*,[82] the court of appeals discussed the appropriateness of the revival at trial of pre-

---

[77]The language "should be known" in relation to duty to warn could be construed to mean that a plaintiff is not to be believed when he states he did not actually know of the danger. On the other hand, the language is usually read as a state of mind which permits a finding of contributory negligence on the part of the plaintiff. To use contributory negligence as a basis for non-duty in warning cases is a circular reasoning process that should be rejected:

> Though these time-honored defenses [contributory negligence and assumption of risk] are frequently invoked to defeat recovery, they are theoretically inapplicable when the defendant's breach of duty is based on a failure to warn. To allow these defenses is to indulge in circular reasoning, since usually the plaintiff cannot be said to have assumed a risk of which he was ignorant or to have contributed to his own injury when he had no way of reasonably ascertaining that the danger of injury existed.

Dillard and Hart, *Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145, 163 (1955).

Strict liability rejects contributory negligence as a defense to strict liability. Thus, the statement that there is no duty to warn when the user *should* know of the danger rejects the very foundation of Comment n to § 402A. In addition, the court's statement in *Craven* that there is no duty to warn when the user should know of the danger is in complete conflict with Kroger Co. v. Haun, 379 N.E.2d 1004 (Ind. Ct. App. 1978) and Bemis Co., Inc. v. Rubush, 401 N.E.2d 48 (Ind. Ct. App. 1980) (obvious danger rule rejected). For an explanation of the problems associated with the "reinjection" of contributory negligence in strict liability actions, see Vargo, *The Defenses to Strict Liability in Tort: A New Vocabulary With an Old Meaning*, 29 MERCER L. REV. 447 (1978).

[78]*See* note 77 *supra.*

[79]401 N.E.2d 48 (Ind. Ct. App. 1980).

[80]*See* note 77 *supra.*

[81]*Id.*

[82]415 N.E.2d 134 (Ind. Ct. App. 1981).

viously dismissed issues. The nuances of the procedural aspects of such revival is discussed in other sections of this Survey.[83]

During its examination of such procedural issues, the *Gilmore* court touched upon the dissimilarity of legal theories in products liability actions. The majority decision in *Gilmore* stated that "there are important and substantial distinctions under strict liability, negligence, and breach of warranty theories especially in the area of defenses."[84] Judge Young, in dissent, agreed with the majority that there were important distinctions among the three theories.[85]

If the *Gilmore* court was addressing the implied warranties which sound in tort as distinct from strict liability then the decision is in conflict with prior decisions in the Federal Court of the Southern District of Indiana.[86] Such a conflict should not be disturbing because a distinction between implied warranties which sound in tort and strict liability in tort, seem to have a sound basis.[87]

G. Conclusion

The Indiana Supreme Court has clearly indicated that no products liability action based upon negligence or strict liability is permissible for products over ten years of age. In addition, the injured party must bring his action within two years of the accrual of his cause of action. The Indiana Supreme Court has hinted that implied warranties which sound in tort may be included within the age limitation of the Products Liability Act. Further restrictions on plaintiff's recovery have been imposed by the application of negligence principles in strict liability warning cases. The restrictive approach of the Indiana Supreme Court in the statute of limitations area seems to be a result of complete deference to the legislature. This restrictive approach does not seem compatible with either negligence or strict liability rationales.

---

[83]*See* Harvey, *Civil Procedure and Jurisdiction, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 69, 81 (1981).

[84]415 N.E.2d at 138.

[85]415 N.E.2d at 139.

[86]*See* Neofes v. Robertshaw Controls Co., 409 F. Supp. 1376 (S.D. Ind. 1976). For a discussion of the conflict between the federal and state courts' opinions concerning the duplicity of implied warranties in tort and strict liability, see notes 36 & 37 *supra* and accompanying text.

[87]*See* Vargo, *1977 Products Survey*, *supra* note 56, at 204-06.

XIII. Professional Responsibility

DAVID A. FUNK*

A. *Introduction*

Professional Responsibility, formerly known as Legal Ethics or Professional Ethics, fits uneasily into a Survey of Recent Developments in Indiana law. Like International Law from its inception, and Commercial Law in its formative stages, it is difficult in Professional Responsibility to ascertain which actions of official and unofficial bodies are law, rather than mere custom or professional etiquette. Similarly, it is difficult to ascertain for whom these actions are binding, and which actions of official and unofficial bodies outside Indiana have become part of the Indiana law of Professional Responsibility. Moreover, yearly developments in Professional Responsibility cannot be analyzed properly without discussing real and asserted power relations among various groups within the legal profession, and their relations with lay groups and governmental institutions. Within the constraints inherent in the annual format,[1] this Article will attempt merely to summarize developments in Professional Responsibility from June 1, 1980 through May 31, 1981,[2] as impartially

---

*Professor of Law, Indiana University School of Law—Indianapolis. A.B., College of Wooster, 1949; J.D., Case Western Reserve University, 1951; M.A., The Ohio State University, 1968; LL.M., Case Western Reserve University, 1972; LL.M., Columbia University, 1973.

Professor Funk practiced law in Wooster, Ohio, for twenty-one years and left practice in 1972 to enter law teaching. At that time he was a member in good standing of the bars of Ohio, the United States District Court for the Northern District of Ohio, the Tax Court of the United States, the United States Court of Appeals for the Sixth Circuit, and the United States Supreme Court. He is a former member of the Wayne County (Ohio), Ohio State, and American Bar Associations, but considers these voluntary associations primarily of law practitioners and judges, and resigned from them as he terminated his other practice commitments in preparation for entering the law teaching profession. He now belongs to various scholarly associations of law teachers.

[1]The following Surveys have appeared in this series since it began in 1975: Bubalo, *Professional Responsibility*, 13 IND. L. REV. 325 (1980); Honecker, *Professional Responsibility*, 12 IND. L. REV. 258 (1979); Jackson, *Professional Responsibility and Liability*, 14 IND. L. REV. 433 (1981); Kelso, *Professional Responsibility*, 9 IND. L. REV. 281 (1975); Kelso, *Professional Responsibility*, 10 IND. L. REV. 283 (1976); Kelso, *Professional Responsibility*, 11 IND. L. REV. 219 (1977).

Professional liability of legal professionals, including attorney malpractice, could be included in Professional Responsibility in a broad sense but is omitted from this survey. Professional liability of legal professionals deals with professional standards, but is best understood in the broader context of torts and more specifically, malpractice generally. *See* Harrigan, *Torts, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 423, 432-33 (1981).

[2]Cases are included as though decided on the date on which the opinion is included in the N.E.2d advance sheets, not necessarily the date of the decision.

as possible using published documents with a minimum of subjective analysis or critical comment.

B. "Statutory" Developments

1. American Bar Association.—The most important current moral code of the American legal profession is the American Bar Association Code of Professional Responsibility originally adopted in 1969. During the Survey year, the House of Delegates of the Association added a new Ethical Consideration (EC9-7) to the Code, stating that a lawyer has an ethical obligation to participate in efforts by the bar to reimburse those who have lost money or property because of the misappropriation or defalcation of another lawyer.[3] This is primarily a rule of aspiration,[4] and applies immediately and directly only to members of the American Bar Association;[5] but Ethical Considerations may be used to interpret Disciplinary Rules and have a tendency eventually to influence the interpretation of professional standards by all adjudicatory bodies.

The American Bar Association Board of Governors approved Revised Rules of Procedure for the ABA Standing Committee on Ethics and Professional Responsibility.[6] These rules do not apply immediately or directly to Indiana disciplinary proceedings, or requests for opinions from the Indiana State Bar Assocation Standing Committee on Legal Ethics, but would apply to members of the American Bar Association dealing with that body's Standing Committee on Ethics and Professional Responsibility. Also, the revised ABA rules eventually may influence the interpretation of the Indiana Rules for Admission to the Bar and the Discipline of Attorneys.

Last year, the American Bar Association Commission on Evaluation of Professional Standards, popularly called the Kutak Commission, prepared a discussion draft of Model Rules of Professional Conduct dated January 30, 1980, intended to replace the 1969 ABA Code of Professional Responsibility, as amended. At its February 1981 meeting, the Kutak Commission voted that its final draft provide for only voluntary disclosure by an attorney of contemplated future mis-

---

[3]7 LEGAL ECONOMICS 10 (Jan. 2, 1981).

[4]*See generally* L. FULLER, THE MORALITY OF LAW at 5 (2d ed. 1969) (contrasting the moralities of duty and of aspiration); ABA CODE OF PROFESSIONAL RESPONSIBILITY, *Preliminary Statement* (1970).

[5]IND. R. ADMISS. & DISCP. 23(2)(a); Kizer v. Davis, 369 N.E.2d 439, 443 (Ind. Ct. App. 1977). Indiana lawyers who practice in subject matter areas subject to the jurisdiction of federal courts and administrative agencies should check the text of the CODE OF PROFESSIONAL RESPONSIBILITY adopted there from time to time, especially with respect to amendments after its original promulgation by the ABA in 1969.

[6]67 A.B.A. J. 504 (1981).

conduct of his or her client unless the attorney is directly involved in the misconduct.[7] Chairman Kutak has been quoted as saying that the latest draft is "so different [from the January 30, 1980 draft] that [he] would describe it as a new text."[8] The last meeting to draft changes in the Model Rules apparently was held in May 1981, after which the final draft was issued.[9] When and if adopted by the ABA House of Delegates,[10] the Model Rules will become binding on members of the American Bar Association. It may be adopted in federal courts and administrative agencies with respect to practice there, and might be adopted in Indiana eventually. In any event, the Model Rules will tend to influence interpretation of existing codes of professional responsibility by all adjudicatory bodies.

2. Indiana Supreme Court.—The Supreme Court of Indiana amended the Indiana Rules for Admission to the Bar and the Discipline of Attorneys in several respects. The amendments deal with admission on foreign license (Rule 6), fees for the bar examination (Rule 16), and fees for professional corporations (Rule 27(h)).[11]

C. Indiana Court Cases

State supreme courts claim inherent power to discipline attorneys admitted to practice before them as officers of the court with respect to all of their professsional activities, whether or not related to pending or contemplated litigation.

1. Effective Representation.—Two Indiana Supreme Court cases passed on the effectiveness of representation of counsel in criminal cases. One[12] involved a defense attorney who put the defendant on the witness stand and examined him concerning a prior juvenile conviction for theft, which the prosecutor could not have disclosed. Also, the defense attorney failed to attempt to establish the defendant's being at home as an alibi, though the defendant's wife's testimony did not agree with the defendant's testimony on this point. Justice DeBruler, writing for a unanimous court, argued

---

[7]Winter, *Kutak Panel Softens a "Whistleblowing" Rule*, 67 A.B.A. J. 282 (1981).

[8]*Id.*

[9]*Id.*

[10]William M. Osborn, Esq., Chairman of the Standing Committee on Legal Ethics of the Indiana State Bar Association, reported that the Kutak Commission planned to submit its final draft of the Model Rules to the ABA House of Delegates in August, 1982. 24 RES GESTAE 661 (1980). A letter dated May 30, 1981, from Robert J. Kutak, Esq., Chairman of the Kutak Commission, which accompanied the ABA COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, PROPOSED FINAL DRAFT: MODEL RULES OF PROFESSIONAL CONDUCT: MAY 30, 1981, says this draft will be submitted to the ABA House of Delegates in January, 1982.

[11]25 RES GESTAE 84, 87 (1981).

[12]Morris v. State, 409 N.E.2d 608 (Ind. 1980).

that deliberate choices made by counsel for some contemplated tactical or strategic reason do not necessarily establish ineffective representation, even though such choices may be subject to some criticism or may turn out later to be detrimental to the client's cause. Perhaps, he speculated, trial counsel's point was that the defendant's prior criminal record did not involve a sex offense.[13]

The other case[14] involved a 1963 guilty plea to murder in exchange for a life sentence, rather than the death penalty. The two defense attorneys spent a total of 154 hours on the case, but did not attempt to claim that the death penalty was unconstitutional under the United States Constitution, or anticipate that it might be held to be so.[15] Justice Hunter, writing for a unanimous court, held that an attorney need not necessarily foresee such a result nearly a decade before it occurred.[16]

2. Information from Clients.—Where an attorney arranged a land sale contract, apparently representing both vendor and purchaser, and the attorney passed on to the buyer statements about the property told to him by the seller, the attorney may be disciplined if the statements turn out to be incorrect and lead to a legal conflict between the parties.[17] The attorney in this case received a public reprimand for multiple employment, prejudicing or damaging his client, and engaging in conduct which adversely reflected on his fitness to practice law.[18]

Where an attorney represented a husband and wife with respect to their corporations, and represented the wife, with the husband's consent, in a divorce action, the attorney later could not report their desperate financial condition or the particulars of the divorce to a police officer after the husband was killed.[19] The wife was suspected of murdering the husband. Therefore, the attorney revealed confidences of his client to the client's disadvantage, and was given a public reprimand.[20]

3. Attorney as Witness.—On the other hand, defense counsel in a criminal case may not cause the prosecuting attorney to be disqualified as such, by calling him as a witness to testify with respect to any offers of leniency made to a prosecuting witness.[21] The ABA

---

[13]*Id.* at 611-12.

[14]Huggins v. State, 403 N.E.2d 332 (Ind. 1980).

[15]Furman v. Georgia, 408 U.S. 238 (1972). *But see* Gregg v. Georgia, 428 U.S. 153 (1976).

[16]403 N.E.2d 332, 334 (Ind. 1980).

[17]*In re* Hugh V. Banta, 412 N.E.2d 221 (Ind. 1980).

[18]*Id.* at 222.

[19]*In re* John M. Rhame III, 416 N.E.2d 823 (Ind. 1981).

[20]*Id.*

[21]Rufer v. State, 413 N.E.2d 880 (Ind. 1980).

Code of Professional Responsibility Disciplinary Rule 5-102 calls for an attorney to withdraw from a trial after serving as a witness to a contested matter in it. Justice Prentice, however, writing for the court wrote that this rule " 'was not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him as counsel.' "[22]

4. Neglect.—Two recent cases involved unexplained neglect of routine matters where the attorney was paid in advance. In one case, a bankruptcy was to be obtained for $302.00,[23] and in another case a marriage dissolution proceeding was to be prosecuted for a $300.00 fee.[24] The first attorney, who did not appear, was suspended for two years,[25] while the second received a public reprimand.[26]

Similarly, where an attorney for an administrator received a check for past due inheritance taxes, but lost the file and did not close the estate until more than four years later, the attorney received a forty day suspension.[27]

5. Failing to File Tax Return.—The Supreme Court of Indiana rather consistently considers conviction for failing to file a federal income tax return as illegal conduct involving moral turpitude, and suspends the offending attorney from practice for about thirty days beginning about one month after the suspension order.[28]

6. Conduct During Disciplinary Proceedings.—An unfortunate case,[29] growing out of long-standing difficulties of Mark Daniel Friedland with the Indiana Supreme Court Disciplinary Commission, ended in disbarrment during the Survey year. Mr. Friedland was suspended for thirty days in 1978 for making apparently agitated

---

[22]*Id.* at 883 (quoting Galarowicz v. Ward, 119 Utah 611, 620, 230 P.2d 576, 580 (1951), *cited in* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR5-102 n.31).

[23]*In re* George A. Purvis, 416 N.E.2d 439 (Ind. 1981).

[24]*In re* Bruce E. Bloom, 406 N.E.2d 1169 (Ind. 1980).

[25]416 N.E.2d at 440.

[26]406 N.E.2d at 1170.

[27]*In re* C. Keith Pettigrew, 416 N.E.2d 821 (Ind. 1981). Mr. Pettigrew also was convicted for failing to file his individual federal income tax return for the year the inheritance tax was due. *Id.*

[28]*Id.* (40 day suspension). *In re* Donald E. Gibson, 416 N.E.2d 822 (Ind. 1981) (30 day suspension). *In re* Greeley Gay, 413 N.E.2d 879 (Ind. 1980) (30 day suspension). The suspension here must have begun one month after the hearing, i.e. on January 19, 1981, rather than on January 19, 1980, the date indicated in the published opinion. *In re* Paul F. Brady, 412 N.E.2d 221 (Ind. 1980) (30 days suspension). *In re* Spencer J. Schnaitter, 407 N.E.2d 1153 (Ind. 1980) (30 day suspension).

The opinions seem to assume that the taxpayer in each case had sufficient gross income to require a return to be filed. Guilty pleas or findings in each case seem to support that assumption. Failure to file a federal income tax return is not a crime unless the taxpayer received gross income for that year in the prescribed amount for the year in question.

[29]*In re* M. Daniel Friedland, 416 N.E.2d 433 (Ind. 1981).

remarks to a referee (David B. Caldwell) who went behind an agreed settlement of a paternity suit.[30] Mr. Friedland also was suspended for nonpayment of disciplinary fees on April 15, 1980, and reinstated on September 9, 1980. Apparently this was a routine administrative suspension.[31] Prior to these two disciplinary actions, James W. Bradford had filed a grievance against Mr. Friedland alleging misrepresentation of the status of a pending lawsuit, made while arguing a motion to intervene in another case. The Bradford complaint ultimately was dismissed by the Indiana Supreme Court for insufficient evidence.[32] Disbarrment of Mr. Friedland resulted, however, from events which took place with respect to the handling of the Bradford claim by the Disciplinary Commission.[33]

On March 15, 1978, Sheldon Breskow, Executive Secretary of the Disciplinary Commission, notified Mr. Friedland that the Bradford grievance had been reclassified as " 'misconduct.' "[34] Five days later, Mr. Friedland and three of his clients called on Mr. Breskow and Cecil L. Martin, investigator for the Disciplinary Commission. Mr. Friedland apparently "became agitated, uttered profanity, and at one point stated to Breskow, 'You are . . . lying . . . and I'm going to get you.' "[35] Several weeks later, Mr. Friedland came back with a letter which he said would be sent to "1,000 selected lawyers" if all grievances were not dropped.[36] The letter referred to Mr. Breskow in uncomplimentary terms and accused him of personal and professional misconduct in the manner in which he was administering the work of the Commission.[37] Several days later, several major Indianapolis law firms received the letter, which accused Mr. Breskow of " 'perverting the function of the commission,' " pursuing " 'personal animosity,' " using his office " 'for [a] personal vendetta,' " and using his " 'power base to harrass lawyers for personal reasons.' "[38] A few

---

[30]*In re* Mark Daniel Friedland, 268 Ind. 536, 376 N.E.2d 1126 (1978). Mr. Friedland's remarks included: " 'This is an ordeal' "; " '[t]his is a travesty' "; " '[t]his is the biggest farce I've ever seen' "; and " 'Judge, you're the biggest fool I've ever seen.' " *Id.* at 538-39, 376 N.E.2d at 1127-28. When the Indiana Supreme Court reviewed the findings of the Indiana Supreme Court Disciplinary Commission, Mr. Friedland's petition for oral argument before the Indiana Supreme Court was denied. *Id.* at 537, 376 N.E.2d at 1127.

[31]416 N.E.2d at 434. Payment of $25.00 as an annual fee to the Indiana Supreme Court Disciplinary Commission, plus $2.00 per day up to a maximum of 20 days' late fee, is necessary to preserve good standing as an attorney in Indiana. *See generally* 23 RES GESTAE 462 (1979).

[32]416 N.E.2d at 434.

[33]*Id.* at 438-39.

[34]*Id.* at 434.

[35]*Id.* at 435.

[36]*Id.*

[37]*Id.*

[38]*Id.*

days before the hearing, Mr. Friedland, "while riding his bicycle past Breskow's personal residence, shouted to Breskow that he had better hope the Commission did not win this case."[39]

During this period, Mr. Friedland attempted to see Judge Paul H. Buchanan, a member of the Disciplinary Commission, and when unable to do so, apparently said in a loud and angry manner, " 'Alright, you are on my list.' "[40] Later Mr. Friedland sent the Disciplinary Commission a draft complaint he had signed as attorney for a client who had lost a case before the court of appeals on which Judge Buchanan sat; the draft complaint sought damages in the sum of $750,000 from Judge Buchanan.[41]

The Supreme Court of Indiana found *per curiam* that the conduct summarized above and reported in a five-page published opinion, was not protected free speech under the first amendment to the United States Constitution.[42] The court further found that Mr. Friedland's motive was "to bring personal pressure on the members and staff of the Disciplinary Commission so as to affect their official judgment;"[43] that he intended to sue those who had "administered and prosecuted this proceeding;"[44] that he had engaged in "undignified and discourteous conduct degrading to a tribunal;"[45] and that he did not "appear to understand the responsibilities of attorneys."[46] Hence, the court concluded that the strongest form of discipline (disbarrment) should be imposed.[47]

In two cases,[48] the Supreme Court of Indiana imposed temporary suspension pending final outcome, retroactive to the date of the hearing before the hearing officer. In each case, the suspended attorney voluntarily consented to suspension retroactive to that date. The facts are not stated in the published order in either case. Two

---

[39]*Id.*

[40]*Id.*

[41]*Id.* An additional grievance, with threats and a suit in federal court is described in the opinion, which should be read in full before drawing any final conclusions concerning this case. Also, the files of the Indiana Supreme Court Disciplinary Commission and transcript of the hearings undoubtedly contain further details which should be taken into account. The brief summary of these events in the text is designed merely to bring the case and reported opinion to the attention of any interested reader.

[42]*Id.* at 437-38.

[43]*Id.* at 435.

[44]*Id.* at 437.

[45]*Id.* at 438-39.

[46]*Id.* at 439.

[47]*Id.*

[48]*In re* William R. McCain, 410 N.E.2d 1201 (Ind. 1980). *In re* Preston M. Thomas, 410 N.E.2d 1202 (Ind. 1980).

published orders granting reinstatement[49] likewise omit any statement of facts. In the first case both the Disciplinary Commission and Supreme Court of Indiana were divided on whether unconditional reinstatement as a member of the bar in good standing should be granted. In the second case, both bodies were unanimous.

7. *Judicial Conduct.*—Two cases involved special rules applicable to judges as legal professionals. The First District of the Court of Appeals of Indiana held that a judge (Paul Jasper) who tried and convicted a person jointly charged with another for possessing narcotics, need not have disqualified himself under Canon 3 of the Indiana Code of Judicial Conduct, when he tried the second defendant.[50] Each of the defendants waived a jury trial. Canon 3(C)(1)(a) requires a judge to disqualify himself when he has personal knowledge concerning a case; but the court held that this is confined to extrajudicial knowledge, absent a showing of actual bias or prejudice, which will not be presumed.

In the second case,[51] Judge William D. Bontrager was found guilty of "indirect criminal contempt" by the Indiana Supreme Court for failing to carry out an order of that court. A defendant pleaded guilty to first degree burglary. At that time, a ten to twenty year sentence was mandatory, and probation was precluded. Judge Bontrager first imposed the prescribed sentence in 1978, but then found the statute unconstitutional and imposed a lesser sentence with probation. On appeal, the Indiana Supreme Court found the statute constitutional and remanded for the required sentence. Judge Bontrager allowed further proceedings for two months and then recused himself. Richard H. Sproull then was appointed as Special Judge and imposed the prescribed sentence, but released the defendant on bond pending another appeal. Apparently Judge Bontrager made public statements concerning the justice of the prescribed sentence under the circumstances of this case. The Supreme Court of Indiana, by a vote of three to two, found Judge Bontrager guilty of "indirect criminal contempt," and referred the matter to the Judicial Qualifications Commission for investigation.[52] This Commission makes recommendations concerning discipline, removal or retirement of Indiana Judges.

---

[49]*In re* Michael Riley, 402 N.E.2d 975 (Ind. 1980) (split). Justice Hunter dissented on the ground, *inter alia*, that the petitioner has admitted "his problem and his inability to completely overcome that problem." *Id.* at 976. The nature of the "problem" is not indicated in the published material. *In re* William D. Neal, 407 N.E.2d 1 (Ind. 1980) (unanimous).

[50]Jones v. State, 416 N.E.2d 880, 881 (Ind. Ct. App. 1981).

[51]Palmer v. State, 418 N.E.2d 530 (Ind. 1981).

[52]*Id.* at 532.

D. Federal Cases

1. Attorney-Client Priviledge of House Counsel.—Federal courts occasionally treat United States Constitutional provisions as limitations on state actions enforcing state standards of professional ethics. They also occasionally enunciate principles affecting federal practice, an increasingly important concern of practitioners and judges everywhere.

A recent United States Supreme Court decision, *Upjohn Co. v. United States*,[53] illustrates the pervasive influence of federal decisions today. In *Upjohn*, interpretation of federal discovery rules in effect defined the basic relationship of a corporate general counsel to his employer. Here, the corporation's general counsel was informed of questionable payments by a foreign subsidiary of the corporation, to foreign government officials. The general counsel conducted interviews with various corporate officers and employees, and sent a questionnaire to managers of foreign operations of the company concerning payments of this type. The Internal Revenue Service later sought to ascertain the tax consequences of such payments as were made, and issued a summons under 26 U.S.C. §7602 calling for production of the questionnaires and notes of the general counsel concerning the interviews. The corporation refused, claiming that these items constituted the work product of an attorney prepared in anticipation of litigation. The Internal Revenue Service successfully sought enforcement of its summons in the United States District Court for the Western District of Michigan, and the Court of Appeals for the Sixth Circuit affirmed in part.[54] The United States Supreme Court, however, held that the requested items were protected by the attorney-client privilege. Justice Rehnquist, writing for himself and seven colleagues, commented that:

> [i]n the corporate context . . . it will frequently be employees beyond the control group as defined by the court below—"officers and agents . . . responsible for directing [the company's] actions in response to legal advice"—who will possess the information needed by the corporation's lawyers. Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information

---

[53]449 U.S. 383 (1981). *See also* Harvey, *Civil Procedure and Jurisdiction, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 69, 86-89 (1982).

[54]United States v. Upjohn, 600 F.2d 1223 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981).

needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.[55]

2. Failure to Prosecute a Civil Action.—In *Roadway Express, Inc. v. Piper*,[56] plaintiff's attorney filed a federal civil rights case in the district court, but failed to comply with subsequent orders relating to discovery and filing briefs. In a five to four decision on this issue, the Supreme Court held that, where an attorney willfully abuses judicial processes, federal courts have inherent power to charge him with the costs and attorney fees of his opponent.[57] "Like other sanctions," Justice Powell wrote, "attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record."[58] Mr. Justice Stevens had grave doubts about the district court's inherent powers in this regard, Chief Justice Burger would not have reached this issue, and Justices Stewart and Rehnquist do not state their positions on this question.[59]

3. Criminal Due Process.—Federal courts often deal with effectiveness of trial counsel in state criminal cases under the due process clause of the United States Constitution. A recent United States Court of Appeals decision for the Seventh Circuit,[60] on appeal from the United States District Court for the Northern District of Indiana, illustrates federal review of state professional activities in this type of case. A prisoner filed a habeas corpus action in 1977 for denial of due process in 1968, in that two law partners, each of whom was privy to what the other was doing, represented two defendants who had participated jointly in criminal activity. One defendant pleaded guilty and testified against the other. The other defendant claimed that representation of both defendants by law partners "tainted" his representation, and denied him effective assistance of counsel. The court of appeals agreed, citing, *inter alia*, ABA Standards Relating to the Administration of Criminal Justice, The Defense Function (1974), and the United States Supreme Court

---

[55]449 U.S. at 391.

[56]447 U.S. 752 (1980).

[57]*Id.* at 764-67.

[58]*Id.* at 767.

[59]*Id.* at 768-72.

[60]Ross v. Heyne, 638 F.2d 979 (7th Cir.), *rev'g*, 483 F. Supp. 798 (N.D. Ind. 1980). Indiana courts also apply federal standards to ascertain whether assistance of counsel in state criminal cases was effective under due process requirements. *See, e.g.*, notes 12-16 *supra* and accompanying text.

For a series of annual surveys with extensive analysis of federal court cases affecting Professional Responsibility, see the chapters bearing that heading in the N.Y.U. School of Law ANNUAL SURVEY OF AMERICAN LAW.

Proposed Amendment to Rule 44 of the Federal Rules of Criminal Procedure, then to become effective December 1, 1980.

E. Ethics Committee Opinions

The American Bar Association Standing Committee on Ethics and Professional Responsibility publishes summaries of professional ethics opinions[61] which apply to all members of the American Bar Association, and tend to influence other committees on legal ethics and professional responsibility, as well as courts.

The Standing Committee on Legal Ethics of the Indiana State Bar Association, a voluntary association of more than 6,500 lawyers,[62] published six opinions during the period of this Survey.[63] Additional opinions have been issued by this Committee.[64] These opinions apply to members of the Indiana State Bar Association, and would tend to influence any committees dealing with legal ethics and professional responsibility in the 95 local bar assocations in Indiana.[65]

F. Indiana Supreme Court Disciplinary Commission

Attorneys admitted to practice in Indiana, whether or not members of any bar association, are subject to the Indiana Rules for

---

[61]Professional Ethics Opinions Nos. 1443-57 are summarized in 66 A.B.A. J. 1136 (1980), and Professional Ethics Opinions Nos. 1458-62 & 1464 are summarized in 67 A.B.A. J. 221 (1981). The complete text of any opinion may be obtained from the National Center for Professional Responsibility, 77 South Wacker Drive, Chicago, Illinois 60606, for 25 cents per page, plus $1.00 for postage and handling. *Id.*

The ABA Standing Committee on Ethics and Professional Responsibility currently has eight members, under the Chairmanship of Henry M. Kittleson of Lakeland, Florida. Membership, from time to time, may be ascertained from opinions published in the ABA Committee on Ethics and Professional Responsibility loose-leaf service, RECENT ETHICS OPINIONS. Five rules for "Composition and Jurisdiction" of the Committee, and twelve "Rules of Procedure," are set forth in 8 MARTINDALE-HUBBELL LAW DIRECTORY 69M (1981). *See also* note 6 *supra* and accompanying text for recent revisions.

[62]*See, e.g.*, INDIANA LEGAL DIRECTORY 90 (1980).

[63]25 RES GESTAE 324 (1981) (Opinion No. 5 of 1980); *id.* 42 (Opinion No. 4 of 1980); *id.* 202 (Opinion No. 3 of 1980); 24 *id.* 688 (1980) (Opinion Nos. 1 & 2 of 1980); and *id.* 644 (1980) (Opinion No. 11 of 1979).

[64]Opinion Nos. 6-8 of 1980, Unpublished Opinion No. U1 of 1980, and Opinion Nos. 1 & 2 of 1981, have been obtained from the Indiana State Bar Association.

Committee membership may be ascertained, from time to time, by consulting the *Directory of the Indiana State Bar Association: Officers, Committees, Sections and Affiliated and Cooperating Organizations* published in RES GESTAE. 23 RES GESTAE 542 (1979) shows William M. Osborn, of Indianapolis, Indiana, as Chairman, and 15 other members from October 1979 to October 1980. 25 *id.* 25 (1981) shows the same membership with two new members added for October 1980 to October 1981.

[65]INDIANA LEGAL DIRECTORY 83-87 (1980) lists 95 local county and city bar associations in Indiana, with their principal officers.

Admission to the Bar and the Discipline of Attorneys, and the Appendix setting forth the Code of Professional Responsibility for Attorneys-at-Law and Judicial Conduct and Ethics.[66] Grievances may be filed with, and are investigated by, the Indiana Supreme Court Disciplinary Commission, a group of seven lawyers or judges appointed by the Indiana Supreme Court.[67] The current annual report of the Disciplinary Commission shows the number of formal grievances filed during the 1979-80 fiscal year to be about the same as those filed in the preceding fiscal year.[68] Some grievances are dismissed by the Disciplinary Commission without further classification; but of the remainder, the most prevalent activities giving rise to formal complaints, in the order of their prevalence, are: criminal matters, divorce matters, wills and estates, tort matters and judicial matters.[69] These also are the activities most often suggesting misconduct, in the order of their prevalence.[70] Many grievances, upon investigation, involve no misconduct in the opinion of the Commission. The most prevalent types of misconduct found as a result of formal grievances, in the order of their prevalence, are: neglect or failure to communicate with the client, incompetence, "minor fee disputes," overreaching, and conflicts of interest.[71] "Excessive fees," on the other hand, are ninth among 17 categories of misconduct; of 21 grievances filed on this ground in fiscal 1979-80, only five were classified as misconduct by the Disciplinary Commission.[72]

G. *Conclusion*

Professional responsibility is both a new field and an old one, both changing and changeless. It currently suffers from the natural propensity of lawyers to treat recent rules and opinions in this field like those in other legal fields, with insufficient attention to real

---

[66]*See* note 5 *supra.*

[67]Members and staff of the Indiana Supreme Court Disciplinary Commission are listed in its annual report for July 1, 1979 through June 30, 1980, published in 24 RES GESTAE 634 (1980). Officers are elected annually. The current list is in 24 RES GESTAE 687 (1980).

[68]24 RES GESTAE 634 (1980). About 300 grievances per year were filed from 1971-72 through the 1976-77 fiscal year. The past two fiscal years, however, show 560 and 544 grievances per year respectively. *Id.* This increase could be the result of more objectionable conduct by attorneys, more public awareness of the availability of grievance machinery, or other factors.

[69]*Id.* at 635-36. Other matters less often giving rise to formal grievances are: real estate matters, contract matters, bankruptcy, collections, guardianships, workmen's compensation, personal misconduct, formation of corporations, zoning, administrative matters, condemnation, and adoption, in the order of their prevalence.

[70]*Id.*

[71]*Id.* at 636-37.

[72]*Id.* at 636.

historical and structural changes in the legal professions, and actual power relations among various official and unofficial bodies seeking to control professional standards and activities.

Our relatively short period of legal education, lack of formal internship, great numbers of lawyers per capita, recent influx of new lawyers, independent, voluntary and overlapping bar associations, and complex federal legal and bar association structures, pose many special problems for the immediate future. Lawyers and judges certainly will survive, as businessmen or government bureaucrats if not as members of a legal profession. But it remains to be seen whether our professional guild traditions, reaching back into the Middle Ages, can survive in a highly regulated commercial economy.[73] If the spirit of professional service which underlies our calling does not survive these times, it will be very difficult to recreate a legal profession in the society of the future.

---

[73]For a recent hint of what the future may hold, see Edwards, *The President's Message: Leader Session Identifies Bar Concerns*, 24 RES GESTAE 657 (1980), referring to a Federal Trade Commission questionnaire addressed to state bar associations, inquiring about association regulations which might limit access to legal services.

XIV. Property

N. Kent Smith*
Mark R. Wenzel**

Numerous cases involving the law of property were decided during the current survey year, and an unusually large number of these made important advances or changes in the law. Many involved interesting factual settings. These cases will be discussed under the following headings: (A) bailments, (B) easements and restrictive covenants, (C) joint ownership, (D) landlord and tenant relations, (E) land ownership in general, (F) lateral and subjacent support, (G) water law, and (H) real estate transactions. Topics not covered under these headings are: adverse possession,[1] conditional land sale contracts,[2] and mineral rights.[3] It is not possible to deal with every

---

*Law Clerk to the Honorable Gene E. Brooks, United States District Court for the Southern District of Indiana, and member of the Indiana Bar; J.D., Indiana University School of Law—Indianapolis, 1981.

**Associate with the law firm of Thornburg, McGill, Deahl, Harman, Carey & Murray—South Bend, Indiana, and member of the Indiana Bar; J.D., Indiana University of Law—Indianapolis, 1981.

[1]Two adverse possession cases were decided during the the current survey period. Both Connors v. Augustine, 407 N.E.2d 1186 (Ind. Ct. App. 1980) and Ford v. Eckert, 406 N.E.2d 1209 (Ind. Ct. App. 1980) involved disputed boundary lines. In each of these cases a successor in interest was claiming to have acquired title to a strip of land abutting a misplaced fence which separated his or her property from a neighbor. In holding for the parties claiming title by adverse possession, both courts found that the general elements of adverse possession were satisfied. Both courts permitted the adverse possessor to tack his possession to that of a former owner to make up the statutory period. In addition, both courts held that in boundary disputes involving fences, the requirement that one pay taxes on property held adversely was inapplicable because the purpose of that requirement was to give notice of the adverse possession, and the erection of the fence satisfied that requirement. The one distinction between the cases is that the *Connors* court applied a ten year statutory period under the present statute, while the *Ford* court applied the period from an older statute.

[2]A number of cases involving conditional land sale contracts and the doctrine of Skendzel v. Marshall, 261 Ind. 226, 301 N.E.2d 641 (1973) were decided during the survey period. For a discussion of these cases, see Townsend, *Secured Transactions and Creditors' Rights, 1981 Survey of Recent Developments in Indiana Law*, 15 Ind. L. Rev. 367, 371 (1981).

[3]Two interesting mineral rights cases were decided during the survey period, both challenging the constitutionality of statutory enactments. State v. Andrus, 501 F. Supp. 452 (S.D. Ind. 1980), *reversed sub nom.* Hodel v. State, 49 U.S.L.W. 4667 (June 15, 1981) dealt with a challenge to the Federal Surface Mining Act, and Short v. Texaco, Inc., 406 N.E.2d 625 (Ind. 1980), *prob. jurisdiction noted*, 49 U.S.L.W. 3710 (March 23, 1981) dealt with a challenge to the Indiana Mineral Lapse Act. For a further discussion of these cases see Neff, *Constitutional Law, 1981 Survey of Recent Developments in Indiana Law*, 15 Ind. L. Rev. 125, 152 (1981).

property case decided, thus, some are treated only very briefly if at all.[4]

A. Bailments

Two cases during the survey period dealt with the issue of a bailee's liability for loss to property occuring during a bailment.[5] In both cases the court essentially made the bailees insurers of the bailed goods: in one case because of a written contract imposing liability for loss on the bailee and in the other case because of an oral agreement to the same effect.

In *Nimet Industries, Inc. v. Joy Manufacturing Co.*,[6] the plaintiff delivered pistons to the defendant bailee to undergo an anodizing treatment process. The pistons were destroyed in a fire at the defendant's plant and the plaintiff brought an action to recover their value. The trial court held for the plaintiff and the defendant appealed.[7] The court first stated the general rule that "[o]rdinarily, a bailee is not liable for the loss of property in his possession absent a finding that he was at fault or otherwise failed to exercise reasonable care."[8] The court went on, however, to say that the parties to a bailment agreement could, by contract, enlarge the bailee's legal responsibility for the bailed property.[9] The case turned on the risk of loss provision in the parties' contract, and the court interpreted the contract to make the bailee responsible for the loss of the plaintiff's pistons while in the defendant's control, regardless of the cause of such loss.[10]

---

[4]There were no significant statutory developments during the survey period.

[5]Nimet Indus., Inc. v. Joy Mfg. Co., 419 N.E.2d 779 (Ind. Ct. App. 1981); Spencer v. Glover, 412 N.E.2d 870 (Ind. Ct. App. 1980).

[6]419 N.E.2d 779 (Ind. Ct. App. 1981).

[7]*Id.* at 780.

[8]*Id.* at 781. The fire in this case resulted from arson perpetrated to cover up a burglary; thus, there was no negligence on the part of the bailee. *Id.*

[9]*Id.* However, the converse—that the bailee may, by contract, narrow the scope of his liability—is not necessarily true. Generally, a court will permit a bailee to escape liability imposed by law if he establishes that the bailor saw and accepted this term in the bailment contract. However, even if this is shown, a court may refuse to enforce the agreement on the ground of public policy. *See* R. BOYER, SURVEY OF THE LAW OF PROPERTY 690 (3rd ed. 1981); *cf.* General Grain, Inc. v. International Harvester Co., 142 Ind. App. 12, 232 N.E.2d 616 (1968) (stating similar rule in connection with professional bailees). *Contra*, RESTATEMENT OF CONTRACTS § 402 (1932).

[10]The relevant portion of the contract read,

> *Vendor* [bailee] *shall be responsible for loss of* or damage to any and all patterns, molds, tools, dies or templates delivered by Purchaser to Vendor and for loss or damage to *any machinery upon which work is to be performed by Vendor while in its possession or control*, however such loss or damage may incur [*sic*].

419 N.E.2d at 781 (emphasis in original). The defendant argued that the pistons did not fall under any of the provisions in the risk of loss provision and therefore were not

In *Spencer v. Glover*,[11] the plaintiff purchased a truck from the defendant, and under the sales agreement the defendant agreed to install a winch on the truck after delivery. The defendant later took possession of the truck and drove it to Flat Rock, Michigan to have the winch installed. During the night the truck was stolen.[12]

Although there was some dispute about the exact language used, it is clear that at the time the defendant took possession of the truck he had made an oral promise to the plaintiff that the truck would be returned in as good a condition as when it was taken. When the truck was not returned, the plaintiff brought an action in two counts: one in negligence against the defendant, as a bailee, and another in absolute liability under the oral contract of bailment.[13] The trial court entered judgment for the plaintiff for the value of the truck without special findings of fact or conclusions of law.[14]

The court of appeals affirmed the trial court's judgment on the merits of the second count—absolute liability—and therefore did not address the negligence issue. The court, as in *Nimet*, held that the general rule of the liability of bailees could be altered by contract.[15] The court rejected the defendant's contention that this case was distinguishable from two previous Indiana cases with similar facts because in *Spencer* there was only an oral bailment contract.[16] The court held that the validity of a bailment contract was governed by the general rules of contract law, under which an agreement such as this was enforceable even though not in writing.[17]

Although neither the *Nimet* or *Spencer* courts dealt specifically with this factor, two other Indiana cases seem to have required that the bailee's assumption of extraordinary liability be clear and unequivocal to be binding.[18] To the extent that *Nimet* and *Spencer* in-

---

covered. The court, however, found that the pistons fell under the clear meaning of the term "machinery." This having been established, the risk of loss provision clearly made the bailee liable for any losses which occured.

[11]412 N.E.2d 870 (Ind. Ct. App. 1980).

[12]The defendant parked the truck in front of a respectable motel. He was not sure if he had locked the truck, but he had retained the keys.

[13]*Id.* at 871-72.

[14]*Id.* at 872.

[15]*Id.* at 872-73. The court's statement of the general rule of liability for injury or destruction of goods was somewhat different than that in *Nimet*. The *Spencer* court said that the fact that the goods were received by the bailee in good condition and returned to the bailor in damaged condition gives rise to an inference of fault or neglect on the part of the bailee. *Id.* at 873 (quoting Hainey v. Zink, 394 N.E.2d 238, 241 (Ind. Ct. App. 1979)).

[16]*See* Light v. Lend Lease Transp. Co., 129 Ind. App. 234, 156 N.E.2d 94 (1959); Morrow, Inc. v. Paugh, 120 Ind. App. 458, 91 N.E.2d 858 (1950).

[17]412 N.E.2d at 873-74.

[18]*See* Light v. Lend Lease Transp. Co., 129 Ind. App. 234, 248-51, 156 N.E.2d 94, 102-03 (1959); Morrow, Inc. v. Paugh, 120 Ind. App. 458, 464-65, 91 N.E.2d 858, 860-61 (1950).

volved clear and unequivocal agreements by the bailees to accept liability beyond that imposed by law[19] they are consistent with prior cases. *Spencer* does, however, make an important advance in that it is now clear that an oral agreement by a bailee to assume extraordinary liability may be enforced.

B. Easements and Restrictive Covenants

The most significant case involving the enforceability of restrictions and covenants decided during the current survey period was *Kuchler v. Mark II Homeowners Association Inc.*[20] In *Kuchler*, homeowners residing in the Mark II Subdivision sought declaratory relief against the Mark II Homeowners Association contesting the power of the association as established under a Declaration of Convenants and Restrictions.[21]

The Mark II Subdivision consisted of three separate sections under development by the Fortress Development Co. Although a preliminary plat of the entire tract had been presented to the zoning board for initial approval, Fortress recorded three separate final plats covering each of the three sections under development. Specifically, final plats for each of the three sections of the development were recorded on June 6, 1973, April 26, 1974, and May 2, 1975 respectively. In addition to these filings, Fortress also recorded a document entitled "Declaration of Covenants and Restrictions." This document, recorded on April 25, 1974, established various restrictions on the property owned by the developer and provided for the creation of a mandatory homeowners association for the purpose of maintaining a two-acre plot of common ground located in Section III of the subdivision.[22] The Mark II Homeowners Association was subsequently established on April 19, 1978. Of the three separate final plats recorded on the development, only the plat recorded for Section II specifically incorporated by reference the Declaration of Covenants.

The trial court in *Kuchler* determined on the above facts that Section II was the only section of the three composing the Mark II Subdivision which was burdened by the Declaration of Covenants.[23] Both parties appealed this determination.[24] The homeowners that lived in Section II of the subdivision contested the trial court's determination that their land was burdened and the association contested

---

[19]*See* 412 N.E.2d at 873-74; 419 N.E.2d at 781.

[20]412 N.E.2d 298 (Ind. Ct. App. 1980).

[21]*Id.* at 299.

[22]The association, a not-for-profit corporation, was to comprise all lot owners and was to maintain the common ground by levying mandatory assessments upon the lot owners, collectible through liens on the various lots.

[23]412 N.E.2d at 299.

[24]*Id.*

the determination that Section III was not so burdened.[25]

The primary argument advanced by the homeowners on appeal was that the Mark II Subdivision was, in fact, an integrated whole. Therefore, because eleven of the lots contained in Section I of the development had been sold prior to the recording of the Declaration of Convenants, the homeowners contended that the developer could not thereafter place further restrictions on the remainder of the subdivision.[26] The court of appeals, however, rejected this contention stating that although a single plat had been submitted to the zoning board for its approval, it was the final plat which was of controlling importance for purposes of recording and deeding the property.[27] Thus, since three separate plats had been recorded, there were, in effect, three separate subdivisions created. The court of appeals affirmed the trial court's determination that further restrictions could be placed on Sections II and III even though several lots of Section I had been previously sold.[28]

With respect to the association's contention that Section III of the subdivision should likewise be burdened by the Declaration of Covenants, the court of appeals stated that " '[t]here are two methods of creating restrictions upon the use of property. One is by express covenants contained in the deed, and the other is by a recorded plat of the subdivision and a purchaser buys lots in the subdivision with reference to the plat.' "[29] Although none of the deeds involved in *Kuchler* contained the Declaration of Covenants, the court observed that the plat of Section II did incorporate the Declaration by reference.[30] The plat to Section III contained no such reference and the court, on that basis, found no error in the trial court's conclusion that only Section II of the subdivision was burdened by the Declaration of Covenants and Restrictions.[31]

The Indiana Court of Appeals decided two interesting easement cases during this survey period.[32] The first of these cases dealt with

---

[25]*Id.*

[26]*Id.*

[27]*Id.* at 300 (citing IND. CODE § 17-3-43-1 (1976)).

[28]412 N.E.2d at 300. Because Section I was not part of the appeal, the court declined to comment on the issue of whether the developer could place further restrictions on that Section following the sale of the eleven lots. *Id.* at n.1.

[29]*Id.* at 300 (quoting Wischmeyer v. French, 231 Ind. 282, 288, 107 N.E.2d 661, 664 (1952)).

[30]412 N.E.2d at 300.

[31]*Id.* The court acknowledged the principle that when a general scheme is evident, the omission of the restrictions from some of the deeds will not inhibit the placing of a burden on the entire tract. *Id.* However, the court stated that because each of the three sections of the subdivision was separate and independent, the recordation of the Declaration of Covenants could not prevail over a complete omission of the restrictions from the deeds of an entire section of the subdivision. *Id.*

[32]Two less significant cases decided during this survey period which involved easements were Brademas v. Carriage House of Mishawaka II, 413 N.E.2d 991 (Ind. Ct.

the quality and nature of the property right which passes upon the grant of an easement. The second case examined the similarity between easements and irrevocable licenses with respect to the rights of purchasers who take the property for value and without notice.

In *Board of Commissioners v. Joeckel*,[33] the defendant, the Board of Commissioners of Vanderburgh County, acquired two separate easements from the plaintiff, Mrs. Joeckel, to accomodate the construction of a bridge project. The easements were granted pursuant to negotiations, and the plaintiff was paid a total of $2,260. No mention was made, either during the negotiations or in the easement itself, concerning the ownership of timber located upon one of the easements. The subcontractor engaged by the defendant to clear the easement had submitted its bid with the qualification that it would receive the timber located on the easements. The subcontractor cut the timber and sold it for a total of $4,252.91. Mrs. Joeckel subsequently brought an inverse condemnation suit for the value of the timber. Although conceding that the defendant could properly clear the timber from the property in furtherance of its use and enjoyment of the easement, the plaintiff contended that the grant of the easement, standing alone, did not give the defendant an ownership interest in the timber. The trial court sustained this contention and the Board of Commissioners appealed.[34]

The court of appeals, following a discussion of the general law of easements, stated that the acquisition of property by eminent domain must be for public use,[35] and that the acquisition of property for use as a roadway gives the public merely a right of passage.[36] Thus, the owner of the property over which a highway is constructed remains the owner in fee of the soil, minerals, and trees located upon the easement so long as that ownership is not inconsistent with the public use.[37] The court observed that the cutting and marketing of the plaintiff's trees "could hardly be classified as a public purpose"[38] and concluded "that the trees may be removed by the holder of the easement if such removal is reasonably necessary to effect the enjoyment of the easement, but the property interest

---

App. 1980) (discussing the procedure and statutes applicable to the vacation of streets necessity against a conditional buyer of a portion of the property was barred by Indiana Trial Rule 13(A)) and Citizens of Heron Bay v. Gore, 409 N.E.2d 1228 (Ind. Ct. App. 1980) (discussing the procedure and statutes applicable to the ;vacation of streets or alleys outside corporate limits of cities and towns).

[33]407 N.E.2d 274 (Ind. Ct. App. 1980), *transfer denied*, Nov. 3, 1980.

[34]*Id.* at 277.

[35]*Id.* at 278.

[36]*Id.* at 277-78.

[37]*Id.* at 278.

[38]*Id.*

in the trees does not pass."[39] The court of appeals affirmed the award of damages in favor of Mrs. Joeckel.[40]

In *Industrial Disposal Corp. v. City of East Chicago*,[41] the plaintiff, Industrial, filed an inverse condemnation action against the city when it discovered a water main buried beneath a parcel of property which it had purchased from the New York Central Railroad Company. The evidence indicated that the construction of the water main had been authorized by an instrument executed and delivered to the city by the railroad on the payment of $6,450 consideration.[42] The instrument was never recorded and the plaintiff had no actual notice of the City's use when it purchased the property from the railroad.[43]

The issue in *Industrial Disposal Corp.* became whether the instrument created an easement in favor of the city or a license given for an indefinite period.[44] After much discussion on the differences between licenses and easements,[45] the court held that Industrial may have acquired the realty free of the city's interest in it regardless of whether the instrument was a license or an easement.[46] The real question seems to have been whether or not Industrial took the land with either actual or constructive notice of the city's rights in it.[47] The court of appeals remanded the case for further determination.[48]

C. *Joint Ownership*

One major case concerning joint ownership was decided during the survey period.[49] *Wienke v. Lynch*[50] involved a conveyance of

---

[39]*Id.*

[40]*Id.* at 280.

[41]407 N.E.2d 1203 (Ind. Ct. App. 1980).

[42]*Id.* at 1204.

[43]*Id.*

[44]*Id.* at 1204-05.

[45]*Id.* at 1205.

[46]*Id.* at 1206.

[47]*Id.*

[48]*Id.*

[49]Wienke v. Lynch, 407 N.E.2d 280 (Ind. Ct. App. 1980). Two less significant cases involving joint ownership were also decided during the survey period. In Cooper v. LaPorte Bank & Trust, 415 N.E.2d 778 (Ind. Ct. App. 1981), the court found that an authorization card, along with evidence that the card was intended only to enable the plaintiff to pay bills on behalf of the owner of the account, created a power of attorney in the plaintiff and did not make her a joint owner. Thus, the joint bank account statute was not applicable and the plaintiff was not entitled to any of the funds upon the death of the owner. *Id.* at 779. In Curtis v. Hannah, 414 N.E.2d 962 (Ind. Ct. App. 1981), the court examined the question of whether each of three cotenants were bound by an agreement that not all of them had signed. *Id.* at 964-65. The court reasoned that because it was possible for cotenants to agree to be bound even if all did not sign the agreement, it was a question of the parties' intent. *Id.*

[50]407 N.E.2d 280 (Ind. Ct. App. 1980).

entireties property by one spouse without the other's consent. The court gave effect to the conveyance on the equitable grounds of laches and acquiescence.[51]

In this case, Elsie Wienke conveyed by warranty deed property owned by the entireties with her husband, Walter, to Colonial Discount Corporation. Although the conveyance was made over Walter's objection, he did appear with his wife for the closing. Walter did not sign the deed, however, and remained outside while Elsie signed. Colonial recorded its deed, made improvements on the land with Walter's knowledge, and subsequently conveyed the property by warranty deed to the Lynches who recorded their deed.

About three years after Elsie's conveyance, Walter initiated dissolution proceedings against her. Although Walter was informed by his attorney that he had a legal interest in the property Elsie had conveyed, the property agreement between Elsie and Walter was silent with respect to the entireties property. About two years later Walter brought suit to quiet title to the property. The trial court held for the Lynches, and Walter appealed.[52]

The court of appeals held that "[h]usband and wife have no separable interest in entireties property, therefore, a conveyance by one tenant is ineffective to pass legal title."[53] However,

> [a] finding that the conveyance is ineffective . . . does not lead to the conclusion that the underlying legal interest is immune from equitable defenses of laches and acquiescence. The doctrines of laches and acquiescence are directed at the actions, not the legal interests, of the party against whom they are raised.[54]

The court found that the defenses of laches and acquiescence were applicable and could bar Walter's assertion of legal title. The court found support for this holding in two early Indiana cases.[55]

The court rejected arguments by the defendant that the trial court had erred in computing the period of delay,[56] that the Lynches were not prejudiced by Walter's delay in asserting his title,[57] and

---

[51]*Id.* at 283-84.

[52]*Id.* at 282.

[53]*Id.* at 283. The court suggested in a footnote that the unilateral conveyance of entireties property was "inoperable" rather than "void." Thus, a conveyance by one spouse was inoperable and passed no title; however, if the other spouse later joined the conveyance or deeded his or her interest to the other, the deed would become operable as of the date of the unilateral conveyance. *Id.* at n.3.

[54]*Id.* at 283-84.

[55]*Id.* at 284 (discussing Hutter v. Weiss, 132 Ind. App. 244, 177 N.E.2d 339 (1961) and Harwood v. Masquelette, 95 Ind. App. 338, 181 N.E. 380 (1932)).

[56]407 N.E.2d at 284-85.

[57]*Id.* at 285.

that the Lynches' use of the equitable defenses of laches and acquiescence was barred because they had constructive notice of Walter's interest.[58] Walter argued that the period of delay relevant for determining laches was the ten months between the time Colonial bought the property from Elsie and later sold it to the Lynches, because that was the only period in which anyone could have been misled by his inaction. The court rejected this argument on the grounds that laches does not involve reliance. The period of time began when Walter learned of his legal claim—when he arrived for the sale of the entireties property by his wife in 1972—and ended when he asserted his claim in 1977, some five years later.[59]

The court also found that the Lynches had been prejudiced by Walter's delay. Prejudice was established by the payment of taxes and by the bearing of the burdens and risks of property ownership by both Colonial and the Lynches and by the improvements made by Colonial.[60] The court also rejected Walter's claim that the provisions of the Occupying Claimants Act[61] prevented any prejudice, because "the statute is not the exclusive remedy for persons paying taxes and making improvements under color of title."[62] Hence, the Lynches could and did elect to pursue their equitable remedies.

Finally, the court recognized that the absence of Walter's name on the deed which purported to convey ownership of the entireties property constituted constructive notice that there was a defect in the title.[63] The court said, however, that there was no evidence that the Lynches had anything more than mere constructive knowledge and that that alone did not necessarily bar use of the defenses of laches and acquiescence.[64] The court said, "One who fails to search the records acts at his own peril, jeapordizing his interest against prior interest holders of record, but it does not follow that such failure to search the records is tantamount to inequitable conduct."[65]

The court suggested in dicta that even actual knowledge by the Lynches might not have defeated a laches defense.[66] The court also suggested that regardless of whether the divorce proceeding was

---

[58] *Id.* at 285-86.

[59] *Id.* at 284.

[60] *Id.* at 285.

[61] IND. CODE §§ 34-1-49-1 to -12 (1976). This statute deals with the rights of both the true owner and the one claiming under color of title to be the owner of a single piece of property.

[62] 407 N.E.2d at 285.

[63] *Id.* at 286.

[64] *Id.*

[65] *Id.* Walter had argued that "the Lynches' failure to review the deed records, and act in accordance therewith, [was] such reckless conduct as to render the aid of equity unavailable to them." *Id.* at 285.

[66] *Id.* at 286-87.

res judicata with respect to Walter's interest in the property, laches would still be a bar.[67]

D. Landlord and Tenant Relations

1. The Implied Warranty of Habitability.—Recently, the courts have begun to depart from the doctrine of caveat lessee to imply a warranty of habitability into the lease of residential property.[68] The implied warranty of habitability imposes two distinct obligations upon the landlord.[69] First, in renting an apartment for residential use, the landlord impliedly warrants that the leasehold is free from any latent defects rendering the premises uninhabitable.[70] Second, the landlord impliedly promises that the leasehold will remain in a reasonably habitable state during the entire term of the lease. This

---

[67]*Id.* at 287.

[68]Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

[69]Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Old Town Dev. Co. v. Langford, 349 N.E.2d 744 (Ind. Ct. App. 1976), *vacated*, 369 N.E.2d 404 (Ind. 1977); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973).

The courts have employed two distinct rationales as support for the imposition of an implied warranty of habitability in the lease of residential property. *See, e.g.*, Krieger & Shurn, *Landlord—Tenant Law: Indiana at the Crossroads*, 10 IND. L. REV. 591, 595 (1977). The first of these rationales stems primarily from the realization that the modern tenant, unlike his feudal counterpart, is rarely interested in the land upon which his apartment is situated. Rather, the modern tenant is a purchaser of an entire package of goods and services including heat, light and ventilation. *Id.* at 600. With this realization, the courts gradually turned to the law of contracts in defining the relationship between the modern landlord and tenant. In particular, the courts began looking toward the UCC and applying its various warranty provisions by analogy to the lease of residential property. *Id.*

The second rationale employed as support for the extension of the implied warranty of habitability to residential leases is grounded in essentially the same public policy considerations which prompted the enactment of many of the housing codes in effect throughout the country—that all Americans should have decent living accommodations. Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961); Krieger & Shurn, *supra*, at 601.

Although either the contract rationale or the public policy rationale will logically support the implied warranty of habitability in residential leases, the precise rationale adopted in a given case may become important with respect to such issues as the standard for determining when a landlord has breached the implied warranty and the waivability of the implied warranty by the tenant. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied* 400 U.S. 925 (1970); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); Krieger & Shurn, *supra*, at 602-05.

[70]Old Town Dev. Co. v. Langford, 349 N.E.2d 744 (Ind. Ct. App. 1976), *vacated*, 369 N.E.2d 404 (Ind. 1977); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973).

latter obligation necessarily carries with it an implied duty to repair.[71]

In *Breezewood Management Co. v. Maltbie*,[72] Dan Maltbie and John Burke, students at Indiana University, entered into a written lease with the Breezewood Management Company for the rental of an apartment in Bloomington, Indiana. The lease was to run for a term of one year and provided for a total rental of $235 per month.

Upon entering into possession of the premises, Burke and Maltbie immediately discovered several defects including leaks in the plumbing, falling plaster, exposed electrical wiring, absence of heat and hot water, and cockroach infestation.[73] The dwelling had previously been cited for more than fifty violations of the Bloomington minimum housing code which was in effect at the time the lease was signed. Robert Lewis, owner and president of Breezewood, testified that he had accompanied the code enforcement official during the inspection, and that the official notified him of several violations at that time.[74] Nonetheless, many of the violations remained uncorrected at the time of trial.[75]

Following several complaints by Burke and Maltbie as to the condition of the premises, and with approximately three months remaining in the term of the lease, Maltbie notified Breezewood of his intention to vacate the apartment and of his refusal to pay further rent. Breezewood agreed to let Burke remain in possession of the premises for a reduced rental but filed suit against both tenants for the balance due under the lease.[76] Burke and Maltbie each filed counterclaims for damages and abatement of rent contending that there existed an implied warranty of habitability in the lease agree-

---

[71]Old Town Dev. Co. v. Langford, 349 N.E.2d 744 (Ind. Ct. App. 1976), *vacated*, 369 N.E.2d 404 (Ind. 1977); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973).

[72]411 N.E.2d 670 (Ind. Ct. App. 1980), *transfer denied*, March 4, 1981.

[73]Since the court's holding was premised upon apparently clear violations of the Bloomington housing code, the court was not called upon to determine which of the specific defects would be considered latent defects nor whether the first breach of the implied warranty of habitability would extend to patent defects existing at the time the lease is executed. However, the *Breezewood* court did seem to indicate in dicta that, at least in the absence of a housing code or ordinance, the implied warranty, if it existed at all, would not extend to patent defects. *Id.* at 674.

[74]Since the landlord clearly had notice of the defects existing at the time the lease was executed, the issue of whether the landlord must possess actual or constructive knowledge of the defective condition and be given a reasonable time to repair before a breach of the warranty will be found was not properly before the *Breezewood* court. For an analysis of this issue *see* Krieger & Shurn, *supra* note 69, at 609.

[75]411 N.E.2d at 671.

[76]*Id.*

ment which Breezewood had breached. The trial court rendered judgment in favor of the tenants, and Breezewood appealed.[77]

In addressing Breezewood's contention that the trial court's judgment was contrary to Indiana law, the court of appeals stated that, in light of several Indiana decisions, it was clear that "the seeds of the modern trend abolishing *caveat lessee* and treating a lease as a contractual relationship have been sown in Indiana."[78] After noting that the Bloomington Housing Code became part of the lease agreement between Breezewood and its tenants,[79] the court concluded that because the premises violated many of the provisions of the Code, Breezewood had breached an implied warranty of habitability.[80]

Concerning the waivability of the implied warranty of habitability in the context of residential leases, the *Breezewood* court distinguished between leases which fall subject to a local housing code and leases which do not. The court quoted several provisions contained in the Breezewood lease which arguably constituted a waiver of the implied warranty on the part of the tenants, Burke and Maltbie.[81] However, the court refused to give effect to these provisions and was, thus, apparently of the opinion that in those cases governed by a local housing code the parties may not, by the terms of the lease agreement alone, waive the implied warranty of habitability.[82] With respect to leases existing outside the scope of a local housing ordinance, however, the court stated that "[a]s long as the premises are not in a substantially different condition than they appear, this court favors upholding the reasonable expectations of the parties."[83]

The final issue addressed on appeal by the *Breezewood* court concerned the amount of damages recoverable by a tenant for the landlord's breach of the implied warranty of habitability.[84] Breezewood argued that, although the tenant's obligation to pay rent was suspended, no damages were recoverable by the tenant upon the

---

[77]*Id.* at 672.

[78]*Id.* at 675.

[79]*Id.*

[80]*Id.* at 676.

[81]*Id.* at 671.

[82]This conclusion is buttressed by the *Breezewood* court's reliance upon Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973), in which, according to the *Breezewood* court, the Massachusetts Supreme Judicial Court held "that no provision of a lease agreement could effectively waive the implied warranty of habitability because the warranty doctrine was incorporated into the state sanitary code which governed all residential leases in the Commonwealth." 411 N.E.2d at 674.

[83]411 N.E.2d at 675 n.2.

[84]*Id.* at 675.

landlord's breach of the implied warranty. The court, however, rejected this contention and affirmed the measure of damages adopted by the trial court which represented the difference between the agreed rental and the fair rental value of the premises as they existed in the defective condition.[85] This measure of damages has generally been referred to as the rent abatement measure of damages.[86]

To be contrasted with the measure of damages employed in *Breezewood* is the measure of damages apparently approved by the Indiana Court of Appeals for the Second District in *Welborn v. Society for Propogation of Faith*,[87] also decided during this survey period. In *Welborn* the Indiana Court of Appeals assumed without deciding that Indiana recognized the implied warranty of habitability in the lease of residential property.[88] Although noting the split in authority as to the appropriate measure of damages for the breach of the implied warranty,[89] the *Welborn* court adopted the standard measure of contract damages represented by the difference between the value of the leasehold as warranted and the value of the leasehold as it actually existed.[90] The *Welborn* court, although assuming that the tenants had met their burden of proof on the issue of breach of the implied warranty,[91] denied relief to the tenants on the basis that they had failed to offer any evidence of the fair rental value of the leasehold as impliedly warranted or as promised.[92] Thus, the court concluded that "without evidence of the issue of the value of the injury, any award by the trial court other than nominal damages would be based on speculation, guess, or surmise and therefore erroneous."[93] It remains an open question as to how the apparent conflict over the measure of damages to be used for the breach of the implied warranty of habitability in residential leases between *Welborn* and *Breezewood* will be resolved.

2. *Covenant of Quiet Enjoyment.*—When a tenant seeks a release from a lease agreement and a suspension of his obligation to pay rent on the basis of the landlord's breach of the covenant of quiet enjoyment, the courts generally require the tenant to show

---

[85]*Id.*

[86]*See, e.g.*, Krieger & Shurn, *supra* note 69, at 615. *See also* Note, *The Great Green Hope: The Implied Warranty of Habitability in Practice*, 28 STAN. L. REV. 729, 760 (1976).

[87]411 N.E.2d 1267 (Ind. Ct. App. 1980).

[88]*Id.* at 1270.

[89]*Id.* at 1270 n.5, 1271.

[90]*Id.* at 1271.

[91]*Id.*

[92]*Id.*

[93]*Id.* at 1270.

that he was actually or constructively evicted from the leased premises.[94]

In *Nate v. Galloway*,[95] the Galloways, as tenants, entered into a written lease with the Oxford Development Corporation for the rental of an apartment. Shortly after the Galloways took possession of the apartment, the apartment was purchased by George Nate who immediately informed the Galloways that their lease with the Oxford Corporation was void. In addition, Nate informed the Galloways that a new lease would be required in which the rent would be increased substantially. Upon the tenants' refusal to execute the second lease, Nate informed the Galloways that he would accept no further rental payments and brought an action for the immediate possession of the leased premises.[96] During the pendency of this action, Nate, in an apparent attempt to harass the tenants into vacating the premises, removed several fixtures from the apartment including the stove, the wall tile in the tub area of the bathroom, and the shower attachment.[97] The landlord failed to replace the stove for approximately forty days and failed completely to make the necessary repairs to the bathroom of the apartment. Finally, following a tender and refusal of the monthly rent, the Galloways filed an answer and a counterclaim to the landlord's action for possession of the premises and claimed damages for intentional infliction of mental distress and breach of the lease's covenant of quiet enjoyment.[98] The trial court awarded both compensatory and punitive damages to the tenants on their claim of breach of covenant.

On appeal, Nate challenged the trial court's finding of a breach of the covenant of quiet enjoyment on the basis that no eviction, either actual or constructive, was shown by the tenants. The tenants did not vacate or surrender the premises at any time. In addressing the issue, the court of appeals distinguished those cases[99] in which

---

[94]Talbott v. English, 156 Ind. 299, 59 N.E. 857 (1901); Avery v. Dougherty, 102 Ind. 443, 2 N.E. 123 (1885).

[95]408 N.E.2d 1317 (Ind. Ct. App. 1980).

[96]The action brought by Nate was based upon an asserted breach of the lease agreement. Subsequently it was discovered that the asserted breach was nonpayment of rent.

[97]The reason given by the landlord for the removal of these items was so that certain repairs could be performed.

[98]The trial court denied recovery of the Galloways' claim of intentional infliction of mental distress and no appeal was taken on the issue. 408 N.E.2d at 1320 n.1.

[99]Bowers v. Sells, 125 Ind. App. 324, 123 N.E.2d 194 (1954); Avery v. Dougherty, 102 Ind. 443, 2 N.E. 123 (1885). The landlord had offered *Bowers* as supporting the proposition that an eviction must be shown to support a finding of a breach of the covenant of quiet enjoyment. 408 N.E.2d at 1321. In *Bowers*, quite unlike *Galloway*, a tenant had been wrongfully evicted from the premises and was seeking damages for the wrongful termination of the lease agreement.

the courts required an eviction as a prerequisite to the finding of a breach of the covenant of quiet enjoyment by noting that in those cases the tenant was requesting an alteration or termination of the rental payments under the lease agreement.[100] The Galloways, however, were not seeking a termination of the lease agreement, but were merely seeking damages for the landlord's breach of covenant. Thus, states the court, "logic dictates that an eviction is not a prerequisite for a recovery of damages based on the landlord's breach."[101] The court summarized the rule as follows:

> [T]he cases show that when a wrongful eviction has occurred, the tenant may clearly sue for damages based on an improper termination of the lease and his lost interest therein. In situations where no eviction has occurred, it appears that the tenant may still recover damages based on the landlord's interference with the quiet enjoyment of the premises.[102]

The court affirmed the trial court's award of both compensatory and punitive damages in favor of the Galloways by concluding that the tenants' injuries were clearly established by the removal of the stove and the bathroom fixtures, and that the landlord's conduct in removing these items was interlaced with the elements of tort.[103]

Although the trial court in *Galloway* suggested that the landlord's actions might conceivably support the finding of a constructive eviction, the tenants did not pursue the issue on appeal.[104] The issue of constructive eviction was, however, subsequently presented to the same court of appeals in *Sigsbee v. Swathwood*.[105]

In *Sigsbee*, the Swathwoods entered a five year lease of one of two adjacent buildings owned by the Sigsbees. The Swathwoods entered into possession of the premises and began operating a small grocery store on August 1, 1976. Following several disputes with the Sigsbees, the Swathwoods abandoned the leased premises in February of 1979, and brought an action to cancel the lease and to recover damages allegedly resulting from the landlord's wrongful competition and interference with their business. The evidence presented at the trial level revealed three primary points of conflict between the parties during the course of the lease. First, from

---

[100]408 N.E.2d at 1321.

[101]*Id.*

[102]*Id.* at 1322. The *Galloway* court offered Kostas v. Kimbrough, 137 Ind. App. 89, 205 N.E.2d 170 (1965), as illustrative of the development of the law in this area. *Id.*

[103]408 N.E.2d at 1323. In upholding the award of punitive damages, the *Galloway* court quoted extensively from Hibschman Pontiac v. Batchelor, 226 Ind. 310, 362 N.E.2d 845 (1977).

[104]408 N.E.2d at 1321 n.2.

[105]419 N.E.2d 789 (Ind. Ct. App. 1981).

the very inception of the lease, the Swathwoods were troubled by periodic leaks in the roof of the leased building. Although the Sigsbees attempted several times to repair the leaks, the roof continued to leak until the Swathwoods abandoned the premises. Second, although under the provisions of the lease the Sigsbees were entitled to inspect the building during the term of the lease, conflict arose between the parties concerning the frequency and methodology of the inspections. The inspection problem, however, was apparently resolved in February of 1978, when Mr. Sigsbee agreed to inspect the building at the same time each week and only when Mr. Swathwood was present. According to Mr. Swathwood, this agreement was satisfactory. Finally, in May of 1978, following an automobile accident in the common parking area, the Sigsbees erected a parking barrier between the two buildings. The barrier concededly did not prevent access to the Swathwoods' store from the adjacent highways. However, at trial the Swathwoods presented evidence that the traffic barrier was responsible for a significant reduction in the Swathwoods' clientele. On the basis of these three disputes concerning the leasehold, the trial court concluded that the Swathwoods were constructively evicted and were therefore entitled to abandon the premises.[106]

On appeal, the Sigsbees argued that there was insufficient evidence to support the trial court's finding of a constructive eviction. In addressing the issue, the court of appeals defined a constructive eviction "as a breach by the lessor 'so direct and positive, and so substantial and permanent in character as to operate as a material and effectual exclusion of the tenant from the beneficial enjoyment of some part of the leased premises.' "[107] The court of appeals further noted that in every case of a constructive eviction the tenant must vacate the premises "within a reasonable time after the lessor has committed the act or omission" considered to be the constructive eviction.[108] Having assumed without deciding that the Sigsbees' failure to successfully repair the leaking roof, the frequency and methodology of inspecting the premises, and the erection of the parking barrier justified the Swathwoods' abandonment,[109] the court of apeals turned to the question of whether the abandonment by the tenants occurred within a reasonable time following each of these acts.[110] Concerning this question, the court stated that generally whether an abandonment occurs within a reasonable time con-

---

[106]The trial court also awarded the tenants $4,000 in damages for the landlord's breach of convenants contained in the lease agreement.

[107]*Id.* at 793. (quoting Talbott v. English, 156 Ind. 299, 59 N.E. 857 (1901)).

[108]419 N.E.2d at 794.

[109]*Id.* at 794, 795 n.5.

[110]*Id.* at 794-95.

stitutes a question of fact to be determined in light of the surrounding circumstances.[111] The record indicates that the Swathwoods had abandoned the premises eight months following the erection of the parking barrier, one year following the resolution of the inspection dispute, and two and one-half years following the failure of the Sigsbees to repair the roof. On these facts and the failure of the Swathwoods to present any circumstances tending to explain or justify the delay in their abandonment, the court of appeals concluded as a matter of law that the Swathwoods did not elect to abandon the premises within a reasonable time.[112]

Although the court of appeals determined that the Swathwoods had waived their right to abandon the premises by not abandoning within a reasonable time, the court concluded that the record did support the trial court's finding of the landlord's breach of certain covenants contained the the lease agreement.[113] The court of appeals remanded the case for determination of the damages resulting from these breaches.[114]

3. Termination and Landlord's Duty to Mitigate Damages.—In *Grueninger Travel Service, Inc. v. Lake County Trust Co.*,[115] the landlord, Lake County Trust, brought an action to recover damages for breach of the lease agreement when the tenant, Grueninger Travel, abandoned the leased premises. The trial court entered judgment in favor of the landlord, and the tenants appealed alleging three points of error: (1) that the tenant's liability on the lease ceased when the landlord accepted a surrender of the premises, (2) that the landlord failed to mitigate damages, and (3) that the tenant's liability should have in no event extended beyond the time that a successor tenant assumed possession of the premises.

The facts established at trial of the cause indicated that, despite discontent with the travel agency's location, James Reiffert, owner of the agency, entered into a three year lease with Lake County Trust in December of 1977. Mr. Reiffert, however, continued his search for a more suitable business location, and on September 14,

---

[111] *Id.* at 794.

[112] *Id.* at 795. In its opinion, the *Sigsbee* court cited three cases in which the tenant's delay in abandonment was held to be excused. *Id.* at 794 (citing American Nat'l Bank & Trust Co. v. Sound City, U.S.A., Inc., 67 Ill. App.3d 599, 385 N.E.2d 144 (1979) (delay of three months excused for reliance upon lessor's promise to repair); Hatenbauer v. Braumbaugh, 220 Ill. App. 326 (1920) (delay of four months excused for lessee's physical disability); General Indus. & Mfg. Co. v. American Garment Co., 76 Ind. App. 629, 128 N.E. 454 (1920) (delay of four months excused where lessor's breach was of an uncertain and continuing nature)).

[113] 419 N.E.2d at 796.

[114] *Id.*

[115] 413 N.E.2d 1034 (Ind. Ct. App. 1980).

1978, despite admonitions by the landlord, Grueninger Travel Service vacated the leased premises. The keys to the vacated premises were returned to the landlord on September 29, 1978.

On appeal, Grueninger asserted that its delivery and the landlord's acceptance of the keys constituted surrender and acceptance of the leased premises. The court acknowledged that in Indiana, "a surrender may be either express or created by operation of law."[116] However, since Grueninger had offered no evidence of an express surrender,[117] the court was left only to consider whether the trial court's finding that there had been no surrender was contrary to law.[118]

A surrender of a tenancy by operation of law will arise only if the parties engage in conduct so inconsistent with the landlord-tenant relationship as to imply that they both agreed to consider the surrender as effectual.[119] It follows that in order to constitute a surrender by operation of law, there must be more than a mere unilateral act by the tenant. In addition, "there must be some decisive, unequivocal act by the landlord which manifests the lessor's acceptance of the surrender."[120] With that statement of the law, the court of appeals concluded that the mere delivery of the keys by Grueninger, without other evidence tending to establish that Lake County Trust had accepted the keys as a surrender, was insufficient to release Grueninger from further liability under the lease.[121]

The second error alleged by Grueninger on appeal was that the landlord had failed to properly mitigate damages because the premises were not re-leased until January of 1979, although an acceptable tenant was available on October 1, 1978.[122] Thus, according to the tenant, the trial court's award of rent and charges subsequent to October 1, 1978 was erroneous.[123] In addressing this contention,

---

[116]*Id.* at 1038 (citing Miller Jewelry Co. v. Dickson, 111 Ind. App. 676, 42 N.E.2d 398 (1942); Donahoe v. Rich, 2 Ind. App. 540, 28 N.E. 1001 (1891)).

[117]413 N.E.2d at 1034. The court noted that "[a]n express surrender is an agreement by the parties . . . which is usually required to be in writing and . . . supported by consideration." *Id.*

[118]Since Grueninger had the burden of proving the surrender, the trial court's judgment in favor of Lake County Trust constituted a negative judgment. As such, the finding could only be attacked on appeal as contrary to law. *See, e.g.*, Brown v. Owen Litho Serv., Inc., 384 N.E.2d 1132 (Ind. Ct. App. 1979); State v. Boyle, 168 Ind. App. 643, 344 N.E.2d 302 (1976).

[119]413 N.E.2d at 1038.

[120]*Id.* at 1039.

[121]*Id.* The court noted that this conclusion was especially compelling given that Lake County Trust had repeatedly admonished Grueninger of its intent to hold Grueninger liable under the terms of the lease. *Id.*

[122]*Id.*

[123]*Id.*

the court of appeals stated that whether a landlord has exercised the requisite diligence in reletting the premises is a question of fact.[124] In affirming the trial court's finding that the landlord had exercised due diligence in reletting the premises, the court of appeals relied heavily on the fact that the tenants failed to give the landlord any notice prior to abandonment. This had effectively frustrated the re-leasing of the premises since it was nearly impossible to lease space without knowing when it would be available.[125] In addition, the court noted that the landlord had engaged in extensive negotiation with several tenants in an effort to lease the space subsequent to Grueninger's abandonment.[126] The evidence indicated that it was advisable to deal with only one prospective tenant at a time and to allow each to reach a decision before commencing discussions with the next.[127] Viewing the entire course of the landlord's conduct, the court was unable to find the trial court's determination in favor of the landlord contrary to law.[128]

The final point raised by Grueninger on appeal was that the trial court erred in holding Grueninger liable under the lease agreement subsequent to January 16, 1979—the date that Lake County Trust executed a new lease of the premises with a successor tenant.[129] The court of appeals disposed of the issue on the language of the lease agreement itself, noting that "[i]t is now clear a lessor and lessee may expressly agree that a re-entry and reletting shall not constitute a surrender."[130] Thus, so long as the landlord does not exceed the rights given him under the lease, no surrender by operation of law will result from the landlords re-entry and reletting of the premises.[131] Under a lengthy provision of the lease agreement,[132] the court held that Grueninger had expressly authorized the

---

[124]*Id.* The allocation of the burden of proving due diligence depends on the lease agreement. If the lease includes a mandatory reletting clause, the landlord carries the burden of proof. In the absence of such a clause, the tenant shoulders the burden of showing that the landlord failed to exercise the requisite care. The tenant Grueninger carried the burden of proof in this case. *Id.* at 1039-40.

[125]*Id.* at 1040.

[126]*Id.* The landlord was apparently attempting to retain the same mix of businesses in the mall. This accounted for some of the delay complained of by the tenants. *Id.* at 1041.

[127]*Id.* at 1040-41.

[128]*Id.* at 1041.

[129]*Id.* It was the policy of the landlord to allow a new tenant between 60 and 120 days following the execution of a lease to remodel the premises. During this period, the new tenant was not asked to pay rent. The new tenant only became liable for rent on the date it opened for business.

[130]*Id.* at 1042.

[131]*Id.*

[132]*Id.* at 1042-43.

landlord to relet the premises without terminating Grueninger's liability under the original lease.[133] The court did however indicate in dictum that the presence of such a lease provision would not automatically prevent the finding of a surrender by operation of law.[134] Other circumstances, in connection with the reletting, which conflict with the continuance of the landlord-tenant relationship, may give rise to a surrender by operation of law and consequent termination of the tenant's liability under the lease.[135]

Another factually interesting case dealing indirectly with the termination of the landlord-tenant relationship decided during this survey period was *Speiser v. Addis*.[136] *Speiser* deals with the right of a hold-over tenant to reimbursement for improvements made to the property after the expiration of the original lease. Prior to the expiration of the lease, the landlord proposed a new lease agreement to the tenant, Speiser. Because of Speiser's untimely response to the proposal, the landlord's offer of new lease terms lapsed.[137] Speiser argued that despite the lapse of the offer, he became a hold-over tenant from year to year, as that was the original term of the lease.[138] However, there was clear evidence in the record to indicate that the landlord intended a month to month tenancy in the event that Speiser held over on the original lease without having accepted the landlord's proposal for a new lease agreement.[139] Even after Speiser had been properly notified by the landlord that his month to month tenancy had terminated, Speiser proceeded to make improvements on the property on the theory that his tenancy was actually year to year. The court found sufficient evidence in the record that the landlord had properly proceeded against Speiser and properly notified Speiser of the termination of his tenancy.[140] Therefore, since all improvements were made after notification, the court denied Speiser reimbursement for his expenditures for improvements.[141]

---

[133]*Id.* at 1043.

[134]*Id.*

[135]The court offered two examples in which a surrender and acceptance may be found despite the presence of a lease agreement to the contrary. First, the court stated that "if the terms of the original lease do not permit a landlord to relet for a period longer than the unexpired term, and the landlord does so, this action indicated the landlord was acting on its own account, inconsistent with the lease relation and therefore, may work a surrender." *Id.* Secondly, the court noted that "[i]f the landlord materially alters the leased premises without the lessee's consent, the lessor may be deemed to have accepted a surrender." *Id.*

[136]411 N.E.2d 439 (Ind. Ct. App. 1980).

[137]*Id.* at 440.

[138]*Id.* at 441.

[139]*Id.*

[140]*Id.*

[141]*Id.* at 439.

4. Scope of the Duty Owed by Landlord and Tenant to Third Parties.—The nature and scope of the duty existing between landlord, tenant and third persons was addressed during this survey period by the Indiana Court of Appeals in *Great Atlantic & Pacific Tea Co. v. Wilson.*[142] In *Great Atlantic*, a case of first impression, Great Atlantic entered into an agreement with PH & T Realty Corporation under which PH & T agreed to construct a building according to specifications supplied by Great Atlantic. Great Atlantic agreed in turn to lease the building from PH & T upon specified terms for the operation of its business. The agreement continued until the end of 1972 when, upon notice, Great Atlantic removed its fixtures and vacated the leased premises. Shortly thereafter, PH & T assumed control of the premises and commenced efforts to sell or release the building. In February of 1973, a realtor, with the consent of PH & T but unsupervised by any officer or agent of PH & T, undertook to show the building to a group of prospective purchasers including Wilson. Although unable to locate the light switches, the group proceeded through the darkened building. Wilson was injured when he fell into the conveyor opening located in the floor of the building which had been used by Great Atlantic to accomodate a conveyor used for moving stock and merchandise from the basement to the sales floor. The opening had been constructed in the building by PH & T as part of the specifications provided by Great Atlantic. Wilson brought suit against both Great Atlantic and PH & T Realty to recover damages for his personal injuries.[143] The trial court rendered judgment against both defendants and Great Atlantic appealed, asserting that the trial court had erred in finding a duty owing between itself and Wilson following the termination of the lease agreement and its surrender of possession and control of the premises.[144]

In resolving the question of whether any residual liability remains with a lessee after it vacates and surrenders the premises to the lessor, the court of appeals examined extensively the rules

---

[142]408 N.E.2d 144 (Ind. Ct. App. 1980). Another case decided during this survey period involving tangentially a landlord-tenant relationship and tort liability was Blake v. Dunn Farms, Inc., 413 N.E.2d 560 (Ind. 1980). *Blake* is discussed in the text accompanying notes 156-71 *infra.*

[143]The plaintiff grounded its suit against Great Atlantic on four separate arguments. First, Wilson asserted that Great Atlantic owed a duty to him on general principles of tort law. Second, Wilson asserted that Great Atlantic was liable for injuries resulting from a defect it created which was eminently dangerous. Third, Wilson argued that there existed an implied warranty of fitness between Great Atlantic and PH&T Realty. Fourth, Wilson asserted that Great Atlantic was liable because the property was used by the public.

[144]PH&T Realty did not appeal the judgment but filed a brief in support of the trial court's judgment.

governing the residual liability of vendors and lessors.[145] On the basis of this examination, the court concluded that "liability for injury ordinarily depends upon the power to prevent injury and, therefore, rests upon the person who has control and possession through ownership, lease, or otherwise."[146] The court noted that Great Atlantic had no affirmative right or duty to alter or improve the leasehold and that Great Atlantic had surrendered the premises in as good a condition as it had received it according to the lease agreement.[147] The court of appeals, therefore, reversed the trial court and ordered judgment in favor of Great Atlantic.[148]

5. *The Lease Agreement in General.*—A factually interesting landlord-tenant case was presented to the Indiana Court of Appeals during this survey period in *Marcovich Land Corp. v. J.J. Newberry Co.*[149] In *Marcovich*, a commercial lessee, J.J. Newberry Co., sought damages for lost profits arising from the landlord's failure to rebuild the leased building following its complete destruction by fire pursuant to a clause contained in the lease. The trial court determined that the written lease existing between the parties was valid and enforceable and required the landlord to reconstruct the building. The trial court awarded the tenant $117,000 as damages for lost profits resulting from the landlord's refusal to reconstruct the leased property.[150]

The court of appeals rejected both the landlord's defense of unconscionability and the defense of commercial impracticality. The landlord argued that the lease became unconscionable upon the happening of events subsequent to the execution of the lease. The court held, however, that the concept of unconscionability applied only to circumstances which existed at the time the contract was entered into.[151] The evidence was clear that both sides had equal bargaining power and entered into the contract willingly; therefore, the court rejected the unconscionability argument as misplaced.[152]

The landlord also argued that rebuilding the leased building was commercially impractical, as under current economic conditions,

---

[145]*Id.* at 147-48. Although noting the appropriateness of the analogy given that the determinative event in either case is the transfer of control and possession of the property, the court assumed without deciding that the residual liability of a lessee would not exceed that of a vendor or lessor and would likely be less, given the limited interest that the lessee has in the property. *Id.* at 150.

[146]*Id.* at 148.

[147]*Id.* at 150.

[148]*Id.*

[149]413 N.E.2d 935 (Ind. Ct. App. 1980).

[150]*Id.* at 937.

[151]*Id.* at 941 (quoting Dan Purvis Drugs, Inc. v. Aetna Life Ins. Co., 412 N.E.2d 129 (Ind. Ct. App. 1980)).

[152]413 N.E.2d at 941-42.

rebuilding would be a bad business risk at great expense. The court held that a bad risk alone was not enough to justify the landlord's failure to rebuild.[153] The *Marcovich* court recognized the general rule that only complete or absolute impossibility is a sufficient basis for an affirmative defense.[154] The court of appeals held further that, even assuming arguendo that an affirmative defense would extend beyond complete or absolute impossibility, the landlord had failed in its burden of proof on the issue.[155]

E. Land Ownership in General

In *Blake v. Dunn Farms, Inc.*,[156] the plaintiff, Blake, was injured when the car in which he was a passenger collided with a horse on a public highway which ran through land owned by the defendant, Dunn Farms. Blake brought an action against both Dunn Farms and Arnold Love, the owner of the animal, alleging that Dunn Farms and Love were negligent in allowing the fences on the property to deteriorate and in permitting a horse to roam freely upon a state highway.

The facts which developed at trial indicated that the property in question, located on both sides of the highway on which the accident occurred, was originally leased by Dunn Farms to Robert McConnell. McConnell, in addition to other farming activities, pastured horses on the east side of the property and sublet the property located on the west side of the highway to Love.[157] Love likewise maintained horses on this portion of the property. Although prior to the accident the McConnells had vacated the leased premises, Love apparently continued to pasture horses on the west side of the highway.

Upon surrender of the property by the McConnells, the stockholders and officers of Dunn Farms made several trips to the farm in order to clean up the buildings and to make arrangments to locate a new tenant. The evidence indicated that the president and the secretary of the corporation had, in fact, visited the property on the date the accident involving the plaintiff occurred. The evidence further revealed that in the various trips to the farm, one or more of the owners had seen horses in the pasture. It was unclear, however, whether the horses observed on those occasions were owned by the McConnells or owned by Love.

---

[153] *Id.* at 944 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 281, Comment d at 50 (Tent. Draft No. 9, 1974)).

[154] 413 N.E.2d at 944.

[155] *Id.*

[156] 413 N.E.2d 560 (Ind. 1980).

[157] Love claimed at trial that he paid rent and rendered services in exchange for the right to pasture his horses.

The court of appeals reversed the trial court's entry of summary judgment in favor of Dunn Farms[158] and remanded the case for further determination.[159] The Indiana Supreme Court granted transfer and vacated the opinions issued by the court of appeals.[160]

Although the case may arguably have been decided on the basis of the law of landlord and tenant,[161] the supreme court chose instead to analyze the situation in terms of the responsibility between landowner and owner-keeper of an animal to provide for the confinement and restraint of the animal.[162] Following a review of case authority[163] and the notation of an Indiana statute,[164] the supreme court stated:

> [I]t is the duty of the owner and the keeper of the animal to keep him confined . . . . If the landowner is neither the owner nor keeper, he has no duty to confine or restrain the animal. If an animal is allowed by its keeper to escape from its confinement and harm results, that damage results from the negligent confinement, not from the condition of the land.[165]

The court, in addition, stated that the responsibility for selecting an appropriate method of confinement for the animal resided with the owner-keeper of the animal rather than with the landowner who neither owned nor kept the animal.[166]

The Indiana Supreme Court in reviewing the evidence determined that Dunn Farms was neither the owner nor the keeper of

---

[158]The trial court's grant of summary judgment was based upon the contention of Dunn Farms that a landowner is not responsible for injuries caused by an animal roaming at large in which the landowner has neither ownership nor custodial control.

[159]Blake v. Dunn Farms, Inc., 396 N.E.2d 415 (Ind. Ct. App. 1979), *aff'd on rehearing*, 399 N.E.2d 431 (Ind. Ct. App. 1980).

[160]413 N.E.2d at 562.

[161]The court of appeals in reversing the trial court judgment in favor of Dunn Farms relied on Siegel v. 1536-46 St. John's Place Corp., 184 Misc. 1053, 57 N.Y.S.2d 473 (1945) in which liability was based in part upon the landlord-tenant relationship existing between the injured party and the corporate owner of the property. Blake v. Dunn Farms, Inc., 396 N.E.2d 415, 417 (Ind. Ct. App. 1979).

[162]413 N.E.2d at 563. The Indiana Supreme Court stated that the cases in which the issue was broached were in fact based upon such an analysis. *Id.* (citing Thompson v. Lee, 402 N.E.2d 1309 (Ind. Ct. App. 1980)).

[163]413 N.E.2d at 563. The court reviewed extensively the case of Corey v. Smith, 233 Ind. 452, 120 N.E.2d 410 (1954) in which the Indiana Supreme Court concluded that the owner-keeper of an animal was responsible for injuries caused by the animal when it roamed into the path of a vehicle on a public road. 233 Ind. at 456 120 N.E.2d at 412.

[164]413 N.E.2d at 563. The statute quoted by the court states that "[a] person responsible for a domestic animal who recklessly permits the animal to run at large commits a class B misdemeanor." IND. CODE § 15-2.1-21-8 (Supp. 1981).

[165]413 N.E.2d at 563 (citation omitted).

[166]*Id.*

the horse involved in the collision with the plaintiff. In addition, the court was of the opinion that there was no material relationship between Dunn Farms and Love, the owner-keeper of the animal.[167] The fact that the officers of Dunn Farms had on occasion observed horses in the pasture was held to create no duty in the officers to prevent or guard against their escape.[168] On this basis, the supreme court affirmed the trial court's reasoning that Dunn Farms, as merely the owner of the property in question, owed no duty to the plaintiff with respect to the method by which the horses were confined.[169]

Justice DeBruler, in dissent, argued that Dunn Farms should be held to be the keeper of the animal which collided with the automobile in which the plaintiff was a passenger.[170] This conclusion was based primarily upon Dunn Farms' complete control over the premises in question and its exclusive authority to repair the deteriorated fences or to remove the animals from the property.[171]

F. Lateral and Subjacent Support

During this survey period the Indiana courts were given the first opportunity in several years to pass upon a lateral support case. The general common law rule of lateral support is that a landowner has an absolute right to have his land, as it exists in its natural state, supported by the land of his adjoining neighbors.[172] Thus, the rule is clear that should an adjoining landowner excavate on his land and thereby deprive his neighbor of lateral support, he

---

[167]*Id.* at 562.

[168]*Id.* at 563.

[169]*Id.* at 564. The Indiana Supreme Court in reaching this conclusion distinguished several lines of authority. The court first distinguished such cases as Pitcairn v. Whiteside, 109 Ind. App. 693, 34 N.E.2d 943 (1941). In *Pitcairn*, the court held that it was the duty of a landowner to exercise reasonable care to prevent injury from a defective or dangerous condition existing on the land to persons using an adjacent highway. The *Dunn Farms* court emphasized that in *Pitcairn*, it was the property owner himself which had created the dangerous condition. In contrast, Dunn Farms had no connection to the agency which created the dangerous condition. 413 N.E.2d at 564.

Secondly, the Indiana Supreme Court rejected the court of appeals conclusion that persons using a public highway stand in a position with respect to the owners of adjacent land similar to that of a business invitee with respect to a landowner. In this regard, the supreme court stated that "[a] particular landowner does not invite all persons using the highway for their own purposes to make that use or traverse that part of the highway adjacent to his own property." *Id.*

[170]413 N.E.2d at 565 (DeBruler, J., dissenting).

[171]*Id.* For further discussion of the *Dunn Farms* case, see Harrigan, *Torts, 1981 Survey of Recent Development in Indiana Law*, 15 IND. L. REV, 425, 433 (1981).

[172]*See, e.g.*, 2 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 415 (repl. ed. 1961).

is liable for the resulting damage to his neighbor's land regardless of whether he was negligent.[173] The rule, however, is different when the injury alleged to have resulted from the removal of lateral support is damage to buildings or structures existing upon the land. There is no absolute right to lateral support of buildings or structures.[174] Thus, liability for injury to buildings must be predicated upon the negligence of the adjoining landowner in accomplishing the activity which resulted in the loss of lateral support.[175] In determining whether an excavator has acted negligently, the courts have regularly applied the general negligence standard of ordinary or due care under the circumstances.[176] The Indiana courts have, in addition, stated that in order for the landowner performing the excavation to relieve himself of the necessity of taking extraordinary measures to protect his neighbor's buildings, the improver must give notice of the intended excavation to the adjoining landowner.[177]

In *Spall v. Janota*,[178] the plaintiff landowner, Janota, sought damages for injury to his home which allegedly resulted from excavation performed on the adjoining land of the defendant, Audie Spall.[179] The record of proceedings revealed that Janota's home was located atop an incline which sloped in the direction of the adjacent lot of Audie Spall. The activity complained of consisted of an excavation into the hillside on the Spall property approximately forty feet in width and twelve feet in depth. The excavation was made to accomodate a mobile home placed upon the Spall property by the occupants. The trial court rendered a decision in favor of the plaintiff and the defendant appealed.

Because damages were sought for injury to Janota's home, the court of appeals noted, in accordance with the general rule, that it was necessary for Janota to show that the excavation on the Spall property was negligently performed.[180] The court was, therefore,

---

[173]*See, e.g.*, Schmoe v. Cotton, 167 Ind. 364, 79 N.E. 184 (1906); Wolf v. Forcum, 130 Ind. App. 10, 161 N.E.2d 175 (1959).

[174]*See, e.g.*, Bohrer v. Dienhart Harness Co., 19 Ind. App. 489, 49 N.E. 296 (1898); Block v. Haseltine, 3 Ind. App. 491, 29 N.E. 937 (1892).

[175]*See* Block v. Haseltine, 3 Ind. App. 491, 29 N.E. 937 (1892).

[176]*See, e.g.*, Bohrer v. Dienhart Harness Co., 19 Ind. App. 489, 49 N.E. 296 (1898); Block v. Haseltine, 3 Ind. App. 491, 29 N.E. 937 (1892).

[177]*See* Bohrer v. Dienhart Harness Co., 19 Ind. App. 489, 49 N.E. 296 (1898).

[178]406 N.E.2d 378 (Ind. Ct. App. 1980).

[179]Although Audie Spall held the record title to the property upon which the excavation was performed, she had purchased the property and given it to her son and daughter-in-law, the Whitsons. The Whitsons occupied the property and authorized the excavation which is the basis of Janota's suit. Janota filed a separate claim against the Whitsons which remained pending at the conclusion of the trial of the claim against Audie Spall.

[180]406 N.E.2d 378, 382.

called upon to determine what type of activity constitutes negligence in lateral support cases. The court began its analysis of the evidence by stating:

> "In determining whether a party has been guilty of carelessness in excavating on his own land, reference may be had to what is usually done by other builders in similar cases." Thus, the standard of care required is that common to all negligence actions, that is, the duty to use reasonable or ordinary care under the circumstances."[181]

Although conceding that it was impossible to formulate a comprehensive definition of "due care" in cases of the *Spall* variety, the court of appeals quoted extensively from the authorities on the issue to establish workable criteria for application to the facts before it.[182] Based upon these criteria the court concluded that, other than the failure to give notice to Janota of the intended excavation, there was no evidence presented in the case which would support a finding that the excavation on the Spall property had been negligently performed.[183]

There are in general two views concerning the requirement that an improver give notice to the adjoining landowners prior to commencing the intended excavation. One line of authority views the failure to give notice as negligence per se.[184] However, the court in *Spall* adopted the alternative and apparently prevailing rule to the effect that the failure to give notice merely constitutes evidence of negligence to be considered by the trier of fact.[185] With respect to the failure of the defendants in *Spall* to give notice prior to commencing the excavation, the court of appeals was of the opinion that the question of foreseeability must necessarily be considered.[186] The trial record disclosed that the excavation upon the Spall property

---

[181]*Id.* at 382 (quoting Block v. Haseltine, 3 Ind. App. 491, 497, 29 N.E. 937, 939 (1892)).

[182]The *Spall* court, in particular, adopted the guidelines set out in Powell's treatise on real property. 406 N.E.2d at 382-83 (quoting 5 *R. Powell, The Law of Real Property* ¶ 701, at 299-302 (1980)).

[183]406 N.E.2d at 383.

[184]*Id.* at 381 (citing Note, *The Changing Doctrine of Lateral Support*, 14 TEMP. L.Q. 243, 254-57 (1940)).

[185]406 N.E.2d at 282 (citing 1 AM. JUR. 2d *Adjoining Landowners* § 51 (1962); 2 C.J.S. *Adjoining Landowners* § 20 (1972)).

[186]406 N.E.2d at 381-82. The court of appeals grounded this conclusion in the observation that most of lateral support cases which have dealt with notice as a critical element were cases in which the excavation was performed immediately adjacent to the foundation of the adjoining building. *Id.* at 382. When excavation is so performed, the danger to the adjoining structure is obvious.

was located, at the very least, thirty-seven feet from the plaintiff's adjoining property.[187] The court, therefore, concluded:

> [I]n view of the facts of this case, the distance separating the cut in the hillside from Janota's house, and the lack of foreseeability of such consequences, we do not believe that lack of notice, standing alone, is sufficient to support a finding of negligence which was the proximate cause of the injury, and thus impose liability on the basis of negligence.[188]

The court of appeals was unable to determine the precise basis for the trial court's decision;[189] they nevertheless reversed the decision in favor of the plaintiff as either contrary to law if predicated upon a theory of absolute liability or as unsupported by the evidence if based upon a theory of negligence.[190]

G. *Water Law*

Several cases involving various issues of water law were decided during the survey period.[191] In *Argyelan v. Haviland*,[192] the plaintiff, Haviland, brought suit against Argyelan alleging that the defendant had accumulated and discharged large quantities of water onto his land. The trial court awarded damages and injunctive relief to the plaintiff, and the defendant appealed, claiming that the trial court's decision was not supported by the Indiana law governing the disposal of surface water.

---

[187]*Id.* at 380.

[188]*Id.* at 383.

[189]*Id.*

[190]*Id.* Although unnecessary to its decision, the court of appeals felt it appropriate to comment upon the issue of damages in lateral support cases. *Id.* at 384. The court stated in this regard that the appropriate measure of damages for injury to an adjoining landowner's building resulting from negligent excavation was the lesser of the diminution in value of the damaged structure or the cost of restoring the structure to its original condition. *Id.* (citing 2 C.J.S. *Adjoining Landowners* § 36 (1972); 1 AM. JUR. 2D *Adjoining Landowners* §§ 74-75 (1962)). Because Janota had failed to present any evidence as to the value of his home in its damaged condition or as to the costs of its repair, the court of appeals concluded that there was no evidence in the case upon which the trial court could have based its award of damages. The award was, therefore, held improper. 406 N.E.2d at 384.

[191]Two cases decided during the survey period which had a less direct impact on water law were Grover v. Frantz, 408 N.E.2d 567 (Ind. Ct. App. 1980) (dealing extensively with various substantive interpretations and procedural requirements surrounding the assessment of costs and damages associated with the reconstruction of legal drains pursuant to the Indiana Drainage Code) and State v. Taylor, 419 N.E.2d 819 (Ind. Ct. App. 1981) (dealing with the tort immunity of the Indiana Department of Natural Resources under the Indiana Tort Claims Act and the exclusiveness of remedy feature of the Indiana Administrative Adjudication Act).

[192]418 N.E.2d 569 (Ind. Ct. App. 1981).

The facts developed at trial indicated that the Havilands and the Argyelans were owners of adjoining tracts of land located in the City of Indianapolis. In improving his parcel, the defendant raised the level of the soil by approximately two feet and constructed a retaining wall parallel to the property line separating his property from that of the plaintiff. The retaining wall was constructed such that the top of the wall was approximately four inches higher than the general level of the defendant's property.[193] The defendant subsequently constructed a one-story building on his lot approximately twenty feet from the retaining wall. Two of the three downspouts which provided drainage from the roof of the defendant's building directed water toward the plaintiff's property.[194] The evidence adduced at trial further indicated that, during a moderate to heavy rain, water would fill the four-inch space on the defendant's side of the retaining wall and flow over the wall "like a waterfall"[195] onto the plaintiff's property.

The court of appeals determined that, with respect to surface water,[196] Indiana recognizes what has commonly been referred to as the "common enemy rule."[197] Under this rule, a proprietor of land may take any action necessary to protect himself against the flow of surface water regardless of the effect upon the lands of adjoining property owners.[198] Through the years, however, the courts have recognized that the rule is subject to certain limitations, including the rule that an owner of land may not deliberately collect surface water and discharge it onto his neighbor's property.[199] It was apparently upon this latter rule that the trial court rendered judgment in favor of the plaintiffs.[200]

In addressing the propriety of the trial court's application of the exception to the common enemy rule, the court of appeals noted

---

[193]The top of the wall was at some points as much as two and one half feet above the level of the plaintiff's property.

[194]The third downspout was connected to a plastic pipe which directed the water flow to a point eastward of the defendant's building.

[195]418 N.E.2d at 572 (quoting the trial record).

[196]The common enemy rule has application only with respect to "surface water" which the Indiana Court of Appeals in Capes v. Barger, 123 Ind. App. 212, 214-15, 109 N.E.2d 725, 726 (1953) defined as follows: "Water from falling rains or melting snows which is diffused over the surface of the ground or which temporarily flows upon or over the surface as the natural elevations and depressions of the land may guide it but which has no definite banks or channel, is surface water."

[197]418 N.E.2d at 571.

[198]*Id.* (citing Cloverleaf Farms, Inc. v. Surratt, 169 Ind. App. 554, 349 N.E.2d 731 (Ind. Ct. App. 1976); Gene B. Glick Co. v. Marion Constr. Corp., 165 Ind. App. 72, 331 N.E.2d 26 (1975)).

[199]418 N.E.2d at 571.

[200]*Id.* at 575.

that the discharge of water onto the land of an adjoining owner was not per se improper.[201] Rather, in order to come within the exception, a defendant must collect surface water and discharge it onto another's property in a *concentrated flow*.[202] In addition, the court interpreted prior cases in which the exception to the common enemy rule was applied as cases in which the defendant engaged in "[a]n affirmative, tortious act at the physical point of discharge"[203] such as the direct channeling of water, by means of ditches or otherwise, onto the land of the plaintiff. The trial record contained no evidence that the defendants had cut slots or channels in the top of the retaining wall and the court of appeals, on that basis, determined that the effect of the retaining wall was, in fact, to protect the property of the plaintiff by dispensing the water evenly across the property line.[204] Thus, the court of appeals concluded its opinion by stating:

> Because there is no evidence in the record that the Argyelans engaged in the positive, tortious wrong of collecting surface water and discharging it in a *concentrated* flow upon the land of their neighbors, the Havilands, the "common enemy rule" prevails and the decision of the trial court must be reversed.[205]

One case decided during the survey period, *State v. Mason*,[206] demonstrates the strictness with which the Indiana Department of Natural Resources will construe permits for construction on the various state lakes and waterways. The case also exemplifies the severity of the consequences which deviation from such a construction permit may yield. In *Mason*, the state department of natural resources sought both a prohibitory injunction to prevent Mason

---

[201]*Id.* at 572 (citing Gene B. Glick Co. v. Marion Constr. Corp., 165 Ind. App. 72, 331 N.E.2d 26 (1975)).

[202]418 N.E.2d at 572.

[203]*Id.*

[204]*Id.* The court of appeals distinguished Conner v. Woodfill, 126 Ind. 85, 25 N.E. 876 (1890), a factually similar case, on the basis of the difference in the distance of the building from the property line of the plaintiff's land. In this regard the *Argyelan* court stated: "In *Conner* the downspouts, like small ditches, directed water on plaintiff's land in concentrated streams. In this case, the water run-off is as it would be if no building had been constructed on Argyelan's property: the surface water flows evenly onto the adjacent property." 418 N.E.2d at 573.

[205]*Id.* at 575 (emphasis in original). Judge Sullivan, in dissent, criticized the majority's assumption that the retaining wall "totally negated the collection and discharge of water by the downspouts." *Id.* at 576. (Sullivan, J., dissenting), on the grounds that the testimony clearly indicated that the water came over the wall "like a waterfall." *Id.* Judge Sullivan would, therefore, have affirmed the trial court's decision as amply supported by the evidence. *Id.*

[206]416 N.E.2d 1312 (Ind. Ct. App. 1981).

from further altering the shoreline of Lake Wawasee and a mandatory injunction requiring Mason to restore the shoreline and lakebed to its original condition. The trial court, finding that Mason had not "radically" deviated from the scope of the construction permit issued by the department, denied all injunctive relief and the department appealed.

In January, 1977, Mason was granted a permit to construct a seawall on his property adjacent to the shoreline of Lake Wawasee. The pertinent provisions of the permit authorized Mason to " '[c]onstruct a concrete seawall in conformance with [the] attached sketch' "[207] and limited the permit " 'to the description and specifications set forth [in the permit including the attached sketch].' "[208] By its terms, the permit would become invalid in the event Mason departed from the authorized specifications. Pursuant to the permit, Mason began excavation in the early fall of 1977. The excavation was accomplished through the use of a dragline which enhanced the value of Mason's lake-side property by effectively creating a boat channel providing access to and from Mason's property. Mason admitted the dredging but maintained that such activity was authorized by the permit. As part of its evidence that Mason had exceeded the scope of the construction permit, the department offered expert testimony that the use of a dragline was an improper engineering technique for constructing the foundation for a seawall.[209]

In finding that the trial court had abused its discretion in denying the injunctive relief requested by the department, the court of appeals observed that the permit issued by the department could not reasonably be construed as authorizing the dredging of such a boat channel fifteen to twenty feet away from the shoreline.[210] The court reversed the trial court and remanded the case with direction to grant both the prohibitory injunction and the mandatory injunction requiring Mason to restore the lakebed to its original condition.[211] Given the relative burdens upon the parties and the quality and nature of the injury involved in *Mason*, the result appears somewhat harsh.[212]

---

[207]*Id.* at 1313. (quoting the permit issued by the Indiana Department of Natural Resources).

[208]*Id.* (quoting the permit issued by the Indiana Department of Natural Resources).

[209]This testimony indicated that the proper method for constructing the foundation of a seawall was through the use of a backhoe rather than a dragline.

[210]*Id.* at 1315.

[211]*Id.* at 1316.

[212]Although unnecessary to its determination, the trial court as part of the explanatory memorandum filed with its judgment, stated:

> It is also noted that the issuance of injunctions is governed by the kinds of considerations reflected in *Schwartz v. Holycross*; whether the issuance of in-

Mid-America Marketing, Inc. v. Falender Development Corp.[213] was another case involving issues of water law which came to the court of appeals on the refusal of the trial court to grant injunctive relief. In *Mid-America*, the plaintiff Mid-America sought a preliminary injunction to enjoin the defendant from entering upon the plaintiff's property and from performing certain drainage work on the property. The trial court denied the injunction and Mid-America appealed.

The trial record disclosed that Mid-America and Falender owned adjacent tracts of land. The Falender tract was located within the corporate limits of the Town of Zionsville while the Mid-America tract was not within the corporate limits. Although both parties contemplated developing their respective tracts, only Falender Development had commenced improvements. As part of the improvement of its tract, Falender removed the portion of the "Saylor drain" which ran through the property owned by Mid-America.[214] Falender then adopted a drainage plan which would have resulted in water from the Falender tract flowing through a proposed culvert under the county road and onto the property owned by Mid-America. The drainage plan further required Falender to perform certain drainage work on the Mid-America property so that the water passing through the proposed culvert would be properly channeled to meet the existing path of surface water over Mid-America's property. The work proposed on Mid-America's property would have been located within seventy-five feet of the Saylor drain. Because part of the Saylor drain was located within the corporate limits of the Town of Zionsville, the county drainage board transferred jurisdiction of the entire drain to the town. The Town of Zionsville approved the plans of the Falender development and notified Mid-America that Falender would be entering its property to perform the proposed drainage work. Upon the notification from the Town of Zionsville, Mid-America sought the injunction which the trial court denied.

A substantial portion of Mid-America's appeal was grounded in its contention that the Town of Zionsville lacked jurisdiction over

---

> junctions is in fact a "matter of grace and not of right," it is apparent on the present record that a refusal to grant injunctive relief will not cause appreciable harm to Plaintiff, while granting such relief would be unnecessarily burdensome and disruptive of defendants' lawful activity, resulting in serious hardship and injustice to them.

Id. at 1315 (quoting trial court's explanatory memorandum). The court of appeals, however, stated that it was unnecessary for the department to show irreparable harm or that the hardships were balanced in its favor since the acts sought to be enjoined were unlawful. *Id.* at 1316 n.3.

[213]406 N.E.2d 372 (Ind. Ct. App. 1980).

[214]The parties agreed that the Saylor drain was a legal drain. *Id.* at 375 n.2.

that portion of the Saylor drain which was located on its property outside the corporate limits of Zionsville. The court of appeals concluded that by the terms of the Indiana Drainage Code, the county drainage board was originally vested with jurisdiction over the Saylor drain.[215] The court construed the drainage jurisdiction transfer provision, section 19-4-1-3.5 of the Indiana Code, as applying only in situations in which a drain is located *within* a given city or town.[216] The court acknowledged the desirability of vesting authority over the entire drain in a single entity but concluded that in *Mid-America* that entity must be the county drainage board rather than the Town of Zionsville.[217] The trial court therefore "erred in concluding that the attempted transfer of jurisdiction was valid as it related to that portion of Saylor drain which is located outside Zionsville."[218]

In approving the proposed drainage work on the Mid-America tract, the Town of Zionsville afforded Mid-America no opportunity to file its objections or to participate in the determination in accordance with the statutory procedures established by the Indiana Drainage Code.[219] The court of appeals concluded that "[t]he fact that the [proposed drainage work] will be accomplished within the area over which the drainage board has a right of entry does not eliminate the need to follow prescribed statutory procedures."[220] The trial court's refusal to enjoin Falender from discharging water on the Mid-America tract was reversed.[221]

H. Real Estate Transactions

1. Warranties.—Two cases decided during the survey period illustrate the limitations which Indiana courts are imposing on the extension of the warranty of habitability. In *Vetor v. Shockey*,[222] the Indiana Court of Appeals refused to extend the warranty of

---

[215]406 N.E.2d at 375.

[216]*Id.*

[217]*Id.*

[218]*Id.*

[219]*Id.* at 376. *See* IND. CODE §§ 19-4-3-1 to -7 (1976) (reconstruction of drains); *Id.* §§ 19-4-4-1 to -8 (1976) (periodic maintenance of drains); *Id.* §§ 19-4-2-1 to -15 (1976) (construction of new drains).

[220]406 N.E.2d at 376. *See generally* IND. CODE § 19-4-6-1 (1976). A parallel result was reached in Grover v. Frantz, 408 N.E.2d 567 (Ind. Ct. App. 1980). In *Grover* the court of appeals concluded that the fact that all reconstruction work on a drain was completed within the statutory right-of-way did not preclude liability on the part of persons performing the reconstruction for negligent destruction of structures upon the right-of-way. *Id.* at 570-71.

[221]*Id.* at 378.

[222]414 N.E.2d 575 (Ind. Ct. App. 1980).

habitability to purchasers of used homes from non-builder-vendors, and in *Pennycuff v. Fetter*,[223] the court found that the warranty was totally inapplicable to a sale of commercial property. A third case, *Orto v. Jackson*,[224] created an exception to the general rule that before a home owner can successfully raise a claim for breach of the implied warranty of habitability he must give the builder notice of the defect.

In *Vetor*, the plaintiffs purchased a used home from the defendant, Vetor, who had occupied the dwelling for four years, but was not the builder. Vetor gave the plaintiffs a warranty deed and made specific representations as to the condition of the septic tank. These representations were that the system was in "satisfactory working condition except for certain times of the year when there would be a lot of water on the ground, the septic system might be a little slow."[225] The plaintiffs had trouble with the septic system and brought an action in small claims court for the cost of repair. The trial court found that there was an implied warranty that the septic tank was in working order and held for the plaintiffs. The defendant appealed.

The court of appeals traced the development of the warranty of habitability, beginning with the common law theory of caveat emptor.[226] The court noted, however, that this theory has lost favor in Indiana as well as in other jurisdictions in the context of the purchase of a new home from a builder-vendor, and mentioned that the Indiana Supreme Court had even extended the warranty of habitability to subsequent purchasers. The court, however, could find no Indiana authority for extending this warranty to the purchaser of a used home from a non builder-vendor. The court noted that all jurisdictions which had directly confronted the question had rejected such an expansion, apparently on the grounds that "in the sale of *used* housing, the vendor usually has no greater expertise in determining the quality of a house than the purchaser."[227]

Although the court recognized that there may be certain situations in which it would be necessary to extend the implied warranty of habitability, the court refused to extend the warranty in this case.[228] Thus, while it refused to make an extension in this case the court left the door open for possible further expansion of the warranty of habitability in other areas. In addition, the court suggested that "[a]s for defects *known* to the vendor of an older home at the

---

[223]409 N.E.2d 1179 (Ind. Ct. App. 1980).

[224]413 N.E.2d 273 (Ind. Ct. App. 1980).

[225]414 N.E.2d 575, 576.

[226]*Id.*

[227]*Id.* at 577 (emphasis in original).

[228]*Id.*

time of sale, the tort theories of misrepresentation or fraudulent concealment are alternatives open to the unknowing buyer."[229] The court refused to consider these theories in this case, however, because of "the meager record presented for review due to the nature of the [small claims] proceedings below, the limited scope of the trial court's judgment, and the lack of an appellees' brief."[230]

In *Orto v. Jackson*,[231] the Jacksons contracted to have a home built by the plaintiffs' construction company. The agreement provided, among other things, that the plaintiffs would "diligently prosecute construction to a conclusion, unless prevented by acts of the Buyer . . . [or] acts of God,"[232] that they guaranteed all materials and workmanship for one year, and that they agreed to complete work within ninety days after beginning construction.[233] Work was begun in early August 1976, and in November, in reliance upon the terms of the agreement and an oral promise made by one of the partners, the Jacksons sold their home. The construction was not in fact completed until late April of 1977, and the Jacksons were forced to rent a home for six months.[234]

When the Jacksons did finally move in, they experienced a number of difficulties including plumbing leaks, an improperly functioning sewage system, and a buckling basement wall. Subsequent problems arose with faulty trusses used to support the floor and this in turn resulted in some of the walls separating from the ceiling. In addition, there was leakage in the roof and basement, and the gutters fell off the house.[235]

The Jacksons contacted the plaintiffs and attempted to resolve many of these problems. The builders successfully remedied the problem of the buckling wall and repaired some of the plumbing leaks and improperly cut doors. However, other defects, of which the plaintiffs had notice, were never corrected. Finally, the defendants repaired some of the defects without giving the plaintiffs any notice at all.

The defendants refused to pay the agreed contract price, and

---

[229] *Id.* The court of appeals in Pennycuff v. Fetter, 409 N.E.2d 1179 (Ind. Ct. App. 1980), refused to find an implied warranty of habitability in the sale of a clubhouse and swimming pool by a non-builder vendor. However, the court did recognize a possible cause of action in fraud or misrepresentation. In this case the buyer was assured by the seller that the swimming pool was in good condition. It was subsequently discovered that several of the pipes had burst.

[230] 414 N.E.2d at 578.

[231] 413 N.E.2d 273 (Ind. Ct. App. 1980).

[232] *Id.* at 274.

[233] "This provision was handwritten into the contract at the request of Mr. Jackson [the defendant]." *Id.*

[234] *Id.*

[235] *Id.* at 275.

the plaintiffs brought suit to foreclose on their mechanic's lien. The Jacksons counterclaimed for damages. Although the trial court ordered a foreclosure, the court also awarded damages to the defendants. The plaintiffs appealed.

One of the plaintiffs' central arguments was that notice of the alleged defects was a prerequisite for finding them liable for breach of the implied warranty of habitability. The court agreed that this was the general rule in Indiana and noted that under *Wagner Construction Co. v. Noonan*[236] there was an additional general requirement that the homeowner allow the builder "reasonable time to repair."[237] The court suggested that "[u]nder a strict reading of *Wagner*, the Jacksons should not be awarded damages for the [defects for which they failed to give notice prior to repair] since they did not give the builders notice of the defects and reasonable time to repair them."[238] However, the court held that the general rule did not apply in this case. It said that the policy underlying the notice requirement was to allow the builders the opportunity to repair the defects, to reduce the damages, to help them avoid similar defects in the future, and to promote settlement.[239] Yet, the evidence in this case demonstrated that after the builders had filed suit they had no intention of making further repairs. Nor had they attempted to discover why the septic system had not worked, so as to avoid similar problems in the future. Attempts at settlement prior to filing of the action had proven unsuccessful. Thus, the court held that the Jacksons were not required to give notice of these defects because it would have served no purpose.[240]

Several other allegations of error were also addressed by the court, but were of lesser significance to the outcome of this case.[241] Finally, the appellate court upheld the trial court's award of compensatory damages to the defendants.[242] It found that the proper measure of recovery was the "reasonable cost of altering the defective parts of the house so as to make them conform to the plans and specifications" plus injuries for delay, economic loss occassioned by the breach of contract and implied warranty of habitability, loss of the full use and enjoyment of the property, and the probable cost of future repairs.[243] Although it suggested that the trial court might

---

[236]403 N.E.2d 1144 (Ind. Ct. App. 1980).

[237]413 N.E.2d at 276.

[238]*Id.*

[239]*Id.*

[240]*Id.*

[241]These allegations included a question of negligence on the part of both parties and a question of accord and satisfaction. *Id.* at 275-77.

[242]*Id.* at 278-79.

[243]*Id.* at 278.

have specified more particularly the allocation of the award, the court found that the evidence established that the Jacksons had expended time, energy, and money in resolving the problems with their home, had lost the use and enjoyment of part of the property, and had suffered aggravation and inconvenience because of the plaintiffs' breach.[244] The court concluded that those damages were foreseeable[245] and that it was within the discretion of the trial court to award them.[246]

2. *Mortgages.*—In *First Federal Savings and Loan Association v. Arena*,[247] the Indiana Court of Appeals applied a general rule of surety law—that a surety is relieved of secondary liability if the principal debtor and creditor materially alter the original contract—in the context of a transfer of mortgaged property.

In *First Federal*, the defendants, the Arenas, had executed a note, mortgage and supplemental agreement with First Federal for a $32,000 loan. About a year later, the bank advanced the Arenas an additional $5,100 and in consideration the Arenas agreed to an increase in the interest rate payable and executed a separate note, mortgage and agreement supplemental. The Arenas subsequently conveyed the real estate by warranty deed subject to the two First Federal mortgages to a third party, Mr. Richardson. On the same day as the transfer, Mr. Richardson negotiated a modification and extension agreement with First Federal under which he assumed both of the prior mortgages, had the period of repayment increased to twenty years, and agreed to an increase in the interest rate payable.[248] Mr. Richardson later defaulted on the mortgages and notes and First Federal sought to recover against the Arenas under the terms of the modification and extension agreement which First Federal had made with Mr. Richardson.[249] The trial court granted a summary judgment for the Arenas and the plaintiff appealed.[250]

The bank based its case on the terms of the Arenas' supplemental agreement that provided that the Arenas were to remain liable on the mortgage upon the transfer of the property to a successor in interest.[251] Furthermore, First Federal had the right to deal with the successor in interest in the same manner as with the mortgagor.[252] However, the court released the Arenas from liability

---

[244]*Id.*

[245]*See id.*

[246]413 N.E.2d at 278.

[247]406 N.E.2d 1279 (Ind. Ct. App. 1980).

[248]*Id.* at 1281-82.

[249]*Id.* at 1282. Richardson and several other lienholders were also made parties. *Id.*

[250]*Id.* at 1281.

[251]*Id.* at 1283.

[252]*Id.*

in this case because Mr. Richardson and First Federal had made material changes in the terms of the mortgage without the Arenas' knowledge or consent.[253]

In reaching this result, the court drew an analogy between the Arenas' relationship to Mr. Richardson and that of a surety and principal debtor. The law of surety will strictly construe any agreement by the surety to future modifications. Therefore, if a material modification is made in a mortgage agreement which exceeds the modifications consented to in the original mortgagor's agreement, the mortgagor is not liable. Based on this reasoning, the court upheld summary judgment for the Arenas.

In *Pearson v. First National Bank*,[254] the Indiana Court of Appeals adopted the majority view with respect to interpreting a loss payable clause of a fire insurance policy in favor of a mortgagee,[255] and in the process the court created a precedent which permits banks to take unfair advantage of mortgagors.

In this case Pearson purchased a restaurant subject to two mortgages in favor of First National and the Small Business Administration. In the purchase agreement Pearson also agreed to insure the premises with a fire, extended coverage, and vandalism policy payable in favor of the bank and the Small Business Administration "as their interests [might] appear."[256] About six months later the restaurant was severely damaged by a fire. An insurance adjuster took bids on the repair work and hired a firm to begin reconstruction. Shortly after beginning work, however, an agent of the construction firm asked Pearson how and when the firm would be paid. Pearson responded by saying he was not sure but assumed that the insurance money would be held in escrow by First National, and he suggested that the agent speak to someone from the bank. When the agent approached the people at First National he was told that no payments would be made until all the reconstruction work was completed. He returned to the bank with Pearson later that afternoon. There they were told that First National had decided to retain the insurance proceeds to pay off the loan rather than rebuild the restaurant. The bank added, however, that it was willing to consider giving Pearson a new loan at a higher interest rate if he desired to rebuild. Pearson had all work stopped and brought suit against First National for breach of contract and tortious miscon-

---

[253]*Id.* at 1284. The court initially found that the questions of whether First Federal could increase the interest rate to Mr. Richardson without discharging the Arenas and the interpretation of the terms of First Federal's agreement with the Arenas were ones of law and therefore appropriate for summary judgment. *Id.*

[254]408 N.E.2d 166 (Ind. Ct. App. 1980).

[255]*Id.* at 169-71.

[256]*Id.* at 168.

duct. First National moved for and was granted a judgment on the evidence on the grounds that Pearson failed to prove any breach of contract or tortious damages. Pearson appealed.

The court of appeals began its discussion by asserting that "[g]enerally speaking, a mortgage agreement is a contract, and as such, the mortgagor and mortgagee are free to enter into an agreement concerning the disposition or application of insurance proceeds in the event of a loss."[257] The court also stated that the well-established rule is that when a mortgagor is required to insure mortgaged property

> under a policy containing a clause making any loss payable to the mortgagee . . . "as his interest may appear," the mortgagee is entitled to the proceeds of the policy to the extent of his mortgage debt, holding the surplus, if any, after extinquishment of his debt for the benefit of the mortgagor.[258]

The court noted that "[i]t has been held specifically that a mortgagee named in a loss payable clause will prevail over a mortgagor who desires to use the money to repair."[259]

The court said that it was not clear whether the mortgagee could apply the insurance proceeds to mortgage debts not yet due, but hinted that it accepted the view that the mortgagee had to hold the proceeds until they were due and could not accelerate and recover the whole mortgage debt at once.[260] The court also rejected the sole contrary view that it could find on this issue. In *Schoolcraft v. Ross*,[261] the California Court of Appeals imposed a good faith requirement in exercising an option to apply the proceeds against the debt rather than to rebuild.[262] In *Schoolcraft*, the court found for the mortgagor when it determined that the mortgagee had not acted in good faith when it chose to apply the proceeds against the debt.[263] The Indiana Court of Appeals' only comment about *Schoolcraft* was that it questioned what the California court meant when it said that the collateral was not impaired, when in fact the house was destroyed.[264]

---

[257] *Id.* at 169.

[258] *Id.*

[259] *Id.* at 170.

[260] *Id.*

[261] 81 Cal. App. 3d 75, 146 Cal. Rptr. 57 (1978).

[262] *Id.* at 80-83, 146 Cal. Rptr. at 60-61.

[263] *Id.* at 80-81, 146 Cal. Rptr. at 60.

[264] 408 N.E.2d at 170. The California court probably meant that had this money been used in good faith to repair the fire damaged home, the home would have been worth roughly what it had been before and thus the security would not have been impaired.

The court concluded by asserting that the terms " 'payable to the bank and the S.B.A. as their interests may appear' " were words of art with a particular meaning at law and were "entitled to an interpretation consistent with that meaning."[265] It also suggested that the plaintiff's evidence was insufficient even if the court were to adopt an implied element of good faith. It noted that there was no evidence that the plaintiff was current with his mortgage payments at the time of the fire, nor was there evidence that the bank ever gave the plaintiff permission to use the proceeds for reconstruction or that the bank even knew reconstruction had begun.[266] Finally, there was no evidence as to the amount of the mortgage balance at the time of the fire, the amount of proceeds actually paid to the bank and credited to the plaintiff, or how and when the mortgages were retired.[267] The court of appeals affirmed the judgment on the evidence.[268]

While the rule adopted by the court of appeals in this case—essentially caveat emptor—may be in line with the view of a majority of jurisdictions, it is subject to criticism and may result in giving mortgagees a great deal of leverage creating a very real possibility for abuse. An initial problem involves the court's unquestioning reliance upon the principle of caveat emptor. Pearson may in fact have been a sophisticated business person who knowingly bargained for this term and therefore should be bound; however, there are numerous consumer mortgage loan situations involving such clauses where the mortgagor will not know what he is giving up and in fact may have little bargaining power at all. Yet, the court makes no distinction. While it may be fair to hold a sophisticated party to the meaning of a term of art, there is less justification for doing so when the mortgagor does not even know it is a term of art.[269]

The most striking problem with this approach, however, can be exhibited by carrying the scenario of this or other similar cases through. Under the court's analysis the mortgagee bank can set up an escrow account and deposit the insurance proceeds in it. Then as the mortgage payments come due the mortgagee can withdraw funds to cover the payments. In the process, however, the mortgagee has left the mortgagor holding a fire damaged building with no funds with which to repair it. The "opportunity" to refinance at a

---

[265] *Id.*

[266] *Id.* at 170-71.

[267] *Id.* at 171.

[268] *Id.*

[269] The Indiana case, Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971), is a leading decision on the issues of the parties' abilities to understand the terms of their contract, equality of bargaining power, and unconscionable contracts. Those factors may be relevant in this case as well.

higher rate of interest undoubtedly provides mortgagees with a means of economic coercion.

The California court's good faith requirement has merit. If, without jeapordizing the mortgagee's interest, the insurance proceeds can be used to fully repair the collateral, the mortgagee receives the protection he sought by requiring insurance and the mortgagor has a building in which to live or do business. This approach seems best suited to reestablish the status quo that existed before the fire and gives neither party an unfair advantage.

3. Land Transfer Agreements.—A number of cases involving issues relating to land transfer agreements arose during the survey period. The areas of law involved included option contracts and pre-emptive right provisions,[270] the statute of frauds and part performance,[271] and the liabilities and rights of parties assisting in land transfer agreements.[272]

a. Option contracts and pre-emptive right provisions.—Two recent cases involved new or interesting questions involving option contracts and pre-emptive rights. In *Theobald v. Chumley*,[273] the plaintiff, Theobald, in November 1972, entered into a real estate contract with the defendant, Mrs. Buskirk,[274] which gave him a ninety-day option to receive six acres of property and cash from Mrs. Buskirk in return for 20.96 acres of his property. Buskirk was to pay $300 per acre for the 14.96 acres in excess of what she conveyed to Theobald, and Theobald was to obtain a proper legal survey description of the land to be conveyed.

In January 1973, Theobald had the survey made and notified Mary Ellen Chumley, who held a power of attorney in behalf of Mrs. Buskirk, that he was exercising the option; he also notified Mrs. Chumley's attorney.[275] It was later discovered that the survey and warranty deed which Theobald had prepared were incorrect and called for two to three more acres than provided for in the option contract. For this reason the deed to Theobald's property was retained by Theobald's attorney and was never delivered. In the meantime, however, Mrs. Buskirk took possession of the 20.96 acres and began to farm it. The problem with the deed was never cor-

---

[270]*See* notes 273-302 *infra* and accompanying text.

[271]*See* Summerlot v. Summerlot, 408 N.E.2d 820 (Ind. Ct. App. 1980), *discussed in* Falender, *Decedents' Estates and Trusts, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 175, 195 (1981).

[272]*See* notes 303-31 *infra* and accompanying text.

[273]408 N.E.2d 603 (Ind. Ct. App. 1980).

[274]At the time of the creation of the contract Mrs. Buskirk was one of two co-owners of the property. She subsequently purchased the other interest.

[275]*Id.* at 604. By agreement the option was exercisable either in person or in writing.

rected, and in August of 1974, Theobald brought suit to recover for crops that were harvested by Buskirk during that year. Buskirk in turn cross-claimed for specific performance of the option contract.

The court of appeals said that the sole issue on appeal was whether the option agreement was effectively exercised, and it rejected an argument by Theobald that the option lapsed after ninety days because his exercise did not fully conform to the option agreed upon.[276] The court said that there were essentially two steps necessary to exercise an option to purchase: (1) the optionee (Theobald) had to make a decision to purchase under the option and (2) that decision had to be communicated to the optionor (Buskirk) within the life of the option.[277]

The court noted that in the typical case, where the optionee was the party attempting to enforce the option, the courts had imposed a strict requirement that the optionee exercise the option specifically as to its terms because he was the sole party capable of consummating the option and forming the contract.[278] In this case, however, it was the optionor and the not the optionee who was attempting to enforce the agreement. The court held that when, within the option period, Theobald communicated his decision to exercise the option to Mrs. Chumley and her attorney, the two steps necessary were satisfied and a contract was formed.[279] The court found that the legal survey that Theobald was required to obtain was not a condition to formation of the contract but "necessary merely to properly convey the exchange of lands,"[280] and the court treated the survey and deed including additional acreage as merely an offer which Mrs. Buskirk could accept or reject.[281] The court concluded by admitting that there were no Indiana cases on point but discussed authority from other jurisdictions which supported its decision. The court determined that this was the fairest and most equitable result.[282]

Stoneburner v. Fletcher[283] involved a pre-emptive right created by a conditional sales contract used in connection with a sale of real estate by the defendant, Stoneburner, to the plaintiff, Fletcher. The contract provided, among other things, that the buyer (Fletcher) would have the privilege of accelerating and paying off the contract at any time after four years from the making of the contract. The buyer would also have an opportunity to purchase a lot located adja-

---

[276] *Id.* at 604-05.
[277] *Id.* at 605.
[278] *Id.*
[279] *Id.* at 605-06.
[280] *Id.* at 605.
[281] *Id.* at 605-06.
[282] *Id.*
[283] 408 N.E.2d 545 (Ind. Ct. App. 1980).

cent to the property he bought "in event same should be for sale at any time in the future."[284]

Fletcher exercised his option to pay off the full amount in accordance with the contract and received a warranty deed from Stoneburner. A few months later Stoneburner began negotiations with the Kopeckys to sell a strip of the lot which was subject to Fletcher's pre-emptive right. Stoneburner sold the strip to the Kopeckys on July 31, 1975.[285] Fletcher brought an action for equitable relief and damages for breach of the clause creating the pre-emptive right and was awarded a judgment of $4,000. Stoneburner appealed.

One of the primary questions on appeal was whether the pre-emptive right survived the termination of the contract when Fletcher prepaid the purchase price. Stoneburner argued that the clause creating the pre-emptive right was an indivisible and interdependent covenant of the contract. Hence, when Fletcher prepaid the purchase price both the contract and the pre-emptive right terminated.[286] The defendant also argued that the description of the property in question was insufficient and that, along with the lack of a separate recital of consideration and execution established that the pre-emptive clause was interdependent and indivisible.[287] The court rejected both of these arguments.

The court in a footnote mentioned that the defendant was apparently making an argument based on the doctrine of merger by deed.[288] The court suggested that this doctrine generally provides that unless there is fraud or mistake, once the buyer accepts the deed, the contract for sale is "merged" into the deed, and the seller can no longer be held to terms which are in the contract but are not included in the deed.[289] The court noted, however, that collateral or

---

[284]*Id.* at 546. The parties labeled this latter provision as either an "option" or an "option of first refusal"; however, the court said this provision was more accurately described as a pre-emptive right. *Id.* at 547 n.4.

[285]*Id.* at 546-47.

[286]*Id.* at 547-48. The defendant argued that the case of Spindler v. Valparaiso Lodge of Benevolent and Protective Order of Elks, No. 500, 223 Ind. 276, 59 N.E.2d 895 (1945), should control the decision here. In *Spindler*, the Indiana Supreme Court held that where a tenant gave up one lease in favor of another lease, he could not enforce a preferential right to purchase the property which was the subject of the first lease. The court of appeals in *Stoneburner*, however, held that *Spindler* was not applicable because the pre-emptive right in *Spindler* pertained to the property that was leased , whereas the pre-emptive right in *Stoneburner* pertained to adjacent property. 408 N.E.2d at 548.

[287]408 N.E.2d at 549.

[288]*Id.* at 548 n.6.

[289]*Id.* at 548-49. Thus, the defendant's argument under the facts of this case would be that when Fletcher received his deed for the tract covered by the first provision of the contract, the terms of the contract were "merged" into the deed. The deed most

independent rights created by the contract of sale are not extinguished if excluded from the deed and constitute an exception to the doctrine.[290] The court maintained that in this case Fletcher's pre-emptive right was not "part of the main purpose of the contract which was the sale and purchase of Parcel C [the parcel dealt with in the first provision of the contract]."[291] In addition the court noted that "the use of the open-ended words 'at any time in the future' could be reasonably interpreted as an expression of the parties' intent, at the time of contracting, that the pre-emptive right would survive the conveyance of the principal property."[292] The court also held that the pre-emptive clause was not interdependent and indivisible from the contract.[293] "A contract is not entire and indivisible simply because it is embraced in one instrument and executed by the same parties."[294] There are two general tests of severability: (1) divisibility of consideration and (2) whether the contract can be completed in part only.[295] The court said, "While the instant contract would not appear to meet the divisibility of consideration test, it could be completed in part only."[296]

The court concluded by saying that the description of the property covered by the pre-emptive rights was "not so insufficient as to render the contract entire and indivisible."[297] It upheld the trial court's ruling that the pre-emptive right survived the tender and delivery of the deed, and it found that the pre-emptive right was still in force.[298]

One question the court never resolved in this case was how long the pre-emptive right would in fact have continued. It clearly rejected the view that the right terminated with the transfer of the deed for the parcel covered by the initial provision of the contract (Parcel C).[299] The trial court found that the pre-emptive right continued for a reasonable time not to expire before the normal pay-out period of the real estate contract.[300] The court of appeals ultimately held that although it felt the probable rule was that the pre-emptive

---

probably would not refer to the pre-emptive right in the second tract and hence Stoneburner would argue that the right was extinguished.

[290] *Id.* at 549.

[291] *Id.*

[292] *Id.*

[293] *Id.* at 549-50.

[294] *Id.* at 549.

[295] *Id.*

[296] *Id.* at 550.

[297] *Id.*

[298] *Id.*

[299] *Id.*

[300] *Id.* at 547.

rights continued for the life of the vendor,[301] and therefore the trial court's determination was erroneous because under either of these tests Stoneburner was liable.[302]

b. Liabilities and rights of parties participating in land transfer agreements.—A number of parties beyond the buyer and seller are often involved in the sale of real estate, and these parties also have rights and liabilities. Two cases decided during this survey period dealt with two of these additional participants: (1) abstract companies[303] and (2) brokers.[304]

i. Abstract companies.—In *Tipton County Abstract Co. v. Heritage Federal Savings and Loan Association*,[305] the court of appeals held that if an abstract company fails to include a prior mortgage against a piece of property in its title opinion, and the party employing the company relies to his detriment on that opinion, the abstracter is liable regardless of whether his employer had constructive or even actual knowledge of the prior mortgage.[306]

In this case the plaintiff, Heritage, took a mortgage loan application which revealed a $25,000 secured loan in favor of another bank from the Bourffs. Heritage sent the abstract of the property to the defendant, Tipton County Abstract Company (TCAC), to be continued from May 1971 to March 1973. TCAC did not find the $25,000 secured loan or any other liens and certified the title. Thereafter, Heritage gave the Bourffs a $70,000 mortgage on the property. In December 1974 the Bourffs declared bankruptcy, and the prior mortgage holder sought to foreclose and joined Heritage as a party defendant. The decree in that case listed the prior mortgage holder as the first mortgagee and Heritage as second. Heritage brought suit against TCAC and recovered $73,999.44 for damages it suffered because of TCAC's failure to include the prior mortgage. TCAC appealed.[307]

The court of appeals based its decision on three fundamental factors—duty, causation, and reliance.[308] It began by saying that TCAC would clearly "be liable for damages caused by their breach of contract by supplying erroneous information in the abstract continuation."[309] The court then quoted an earlier case to show that the reason for this rule was that the abstracter owed his employer a duty

---

[301]*Id.* at 548.
[302]*Id.*
[303]*See* notes 305-16 *infra* and accompanying text.
[304]*See* notes 317-31 *infra* and accompanying text.
[305]416 N.E.2d 850 (Ind. Ct. App. 1981).
[306]*Id.* at 854.
[307]*Id.* at 852.
[308]*See id.* at 852-54.
[309]*Id.* at 852.

of ordinary care and diligence.[310] However, implicit in the court's reasoning is the idea that this duty of care is applicable whether the abstracter's negligence is the erroneous inclusion of improper information or the absence of some relevant facts.[311]

The court went on to discuss the factors of causation and reliance. It said, "The abstracter, however, could not be liable for damages caused by factors other than his breach. . . . Such damages include those caused by the plaintiff's reliance on the abstracter's breach."[312] The court referred to an *American Jurisprudence 2d* annotation for the proposition that a party could rely on the truth and accuracy of an abstracter's report, "unless perhaps the terms of the certificate made it plainly apparent that there was a mistake,"[313] and then the court maintained that under Indiana law it was not clear "that even *actual knowledge* of an abstracter's breach negates recovery if the plaintiff relied on the abstracter's error."[314]

The court ultimately went on to resolve this question and held that

> Heritage's knowledge, actual or constructive, of the prior mortgage is irrelevant if they in fact relied on TCAC's representation that it did not exist. Thus, the gist of TCAC's issue must be whether there is sufficient evidence to support the trial court's finding that Heritage relied on TCAC's error in granting Bourffs the mortgage.[315]

The court reviewed the record and found there was sufficient evidence to support the trial court's finding and affirmed the lower court's decision.[316]

ii. Brokers.—The two common issues that arise with regard to real estate brokers are conformance with the statutory requirements that a broker must plead and prove he is duly licensed[317] and that a broker's contracts must be in writing[318] before he can recover

---

[310]*See id.* at 852-53 (quoting Mayhew v. Deister, 144 Ind. App. 111, 118-19, 244 N.E.2d 448, 452 (1969)).

[311]*See* 416 N.E.2d at 853.

[312]*Id.* (citation omitted).

[313]*Id.* (referring to 1 AM. JUR. 2d *Abstracts of Title* § 19 (1962)).

[314]*Id.*

[315]*Id.* at 854 (footnote omitted).

[316]*Id.* at 854, 855.

[317]IND. CODE § 25-34.1-6-2(b) (Supp. 1981). The survey cases dealing with this requirement arose while a prior version of the statute. IND. CODE § 25-34-1-9 (1976) (repealed 1979), was in effect.

[318]IND. CODE § 32-2-2-1 (1976). This so-called "broker's Statute of Frauds" provides:

> No contract for the payment of any sum of money or thing of value, as and for a commission or reward for the finding or procuring by one (1) person of a purchaser for the real estate of another, shall be valid unless the same

a commission. Three cases decided during the survey period—one from the first district dealing with the latter issue[319] and two from the third district dealing with the former issue[320]—indicate that there is a difference in the strength or effect of these requirements. The writing requirement is strictly applied while proof of licensing is not.

In *William S. Deckelbaum Co. v. Equitable Life Assurance Society*,[321] the first district dealt with the writing requirement and held that in the absence of a written contract for payment of a commission, a broker could not prevail in an action for tortious interference with a contractual relationship.[322]

In September, 1977, Equitable Life Assurance Society, the owner of the J.C. Penney Building in downtown Indianapolis, indicated to Deckelbaum, an industrial and commercial real estate company, its desire to sell the Penney Building. After Deckelbaum informed Equitable that it had initiated negotiations with Blue Cross, Deckelbaum was given the authority to sell the building for $3,000,000. For its services, Deckelbaum was to receive six percent of the sales price; however, no written contract was ever entered into for payment of the commission.

On April 20, 1978, Blue Cross submitted an offer to purchase through its alleged realtor, F.C. Tucker, and on May 12, 1978, Equitable accepted that offer. Equitable paid Tucker a $150,000 commission. Deckelbaum brought suit against Equitable, Blue Cross, and Tucker for compensatory and punitive damages for conspiring to defraud it. Deckelbaum later dismissed without prejudice its claim against Tucker, and the trial court sustained a Trial Rule 12 motion when Deckelbaum failed to plead over within the time allowed. Deckelbaum appealed. Deckelbaum argued that its claim was for tortious interference with a *pre-contractual* business relationship which did not require the existence of a valid contract and not for the recovery of his commission which would require a written contract.[323] The court never addressed Deckelbaum's allegation of inter-

---

> shall be in writing, signed by the owner of such real estate or his legally appointed and duly qualified representative: Provided, That any general reference to such real estate sufficient to identify the same shall be deemed to be a sufficient description thereof.

Id.

[319]William S. Deckelbaum Co. v. Equitable Life Assurance Soc'y, 419 N.E.2d 228 (Ind. Ct. App. 1981).

[320]Sutton v. Roth, Wehrly, Heiny, Inc., 418 N.E.2d 229 (Ind. Ct. App. 1981); Marotta v. Iroquois Realty Co., 412 N.E.2d 797 (Ind. Ct. App. 1980).

[321]419 N.E.2d 228 (Ind. Ct. App. 1981).

[322]*Id.* at 232.

[323]*Id.* at 230.

ference with a pre-contractual relationship.[324] Because under Indiana law the tort of interference with a contractual relationship is dependent upon the existence of a valid contract and because no enforceable agreement existed here, the court ultimately held that the trial court's dismissal had to be upheld.[325] In reaching this decision, the court discussed the Indiana law on brokers' commissions.[326] It said that although some jurisdictions allow recovery of brokers' commissions under either oral or written contracts, "Indiana . . . has precluded recovery of [brokers'] commissions when the agreement is not in writing."[327]

Although the first district may not have gone so far as to make a writing a jurisdictional issue without which it had to hold for the parties opposing the broker, it made it quite clear that a broker will have an extremely difficult time recovering a commission without a written agreement.

On the other hand, the third district applied a much more lenient standard in connection with the requirement that a realtor prove he is duly licensed before he can recover a commission. In *Sutton v. Roth, Wehrly, Heiny, Inc.*,[328] the court held that proof of licensing could be inferred from other facts presented into evidence, for example a listing agreement,[329] and in *Marotta v. Iroquois Realty Co.*,[330] the court held that direct proof of due licensing was unnecessary if the parties stipulated to that fact.[331]

---

[324]*See id.* at 230-32. The court may have determined that the parties intended to create a contract when they made their oral agreement and that Deckelbaum's formulation of the case as one dealing with a pre-contractual relationship was therefore only a ploy to avoid the rules that related to tortious interference with a contractual relationship; however, it never gave any reason for ignoring Deckelbaum's actual argument.

[325]*Id.* at 232.

[326]*See id.* at 230-32.

[327]*Id.* at 230.

[328]418 N.E.2d 229 (Ind. Ct. App. 1981).

[329]*Id.* at 232.

[330]412 N.E.2d 797 (Ind. Ct. App. 1980).

[331]*Id.* at 799-800.

XV. Secured Transactions and Creditors' Rights

R. BRUCE TOWNSEND*

Over sixty cases dealing with problems in secured transactions and creditors' rights were handed down in this last year, and in the process the court of appeals has credibly resolved many difficult and complex problems but generously has left some matters for good faith criticism and discussion. Commercial opinions by the supreme court tend to be regarded as carved in stone. Forceful justification for the tendency of that court to shy away from appeals in this area is to be found in *Van Bibber v. Norris*.[1] This decision gave effect to non-waiver clauses in consumer credit transactions which this writer and surely others will agree is an offensive "pig" type agreement seldom approved elsewhere.

Special attention is reserved for decisions recognizing that an entireties owner may be barred by laches from asserting that a conveyance or mortgage by the other, alone, is of no effect;[2] involving the rule of *Skendzel v. Marshall*,[3] especially when the debtor's equity was enhanced or diminished by improvements on one side and waste or other misconduct on the other;[4] dealing with description of and priorities between security interests in livestock when it becomes commingled;[5] categorizing leases with option to purchase as secured transactions;[6] involving transfers by the debtor of property "subject to" a lien on the property;[7] concerning the right of a debtor to insist that insurance proceeds be applied towards repair or rebuilding of the collateral;[8] procedure in the sale of goods by artisan lienholders;[9]

---

*Professor of Law, Indiana University School of Law, Indianapolis. A.B., Coe College, 1938; J.D. University of Iowa, 1940.

[1]419 N.E.2d 115 (Ind. 1981), *discussed in* text accompanying notes 81-82 & 105-120 *infra*.

[2]Wienke v. Lynch, 407 N.E.2d 280 (Ind. Ct. App. 1980), *discussed in* text accompanying note 14 *infra*.

[3]261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974), *petition for writ of mandate denied*, 263 Ind. 337, 330 N.E.2d 747, *aff'd*, 264 Ind. 77, 339 N.E.2d 57 (1975).

[4]*See* text accompanying notes 27-38 *infra*.

[5]Cargill, Inc. v. Perlich, 418 N.E.2d 274 (Ind. Ct. App. 1981), *discussed in* text accompanying notes 55-59 *infra*. This case involves complex issues of after-acquired collateral and description under the Uniform Commercial Code.

[6]Bolen v. Mid-Continent Refrigerator Co., 411 N.E.2d 1255 (Ind. Ct. App. 1980), *discussed in* text accompanying notes 60-63 *infra*.

[7]First Federal Sav. and Loan Ass'n v. Arena, 406 N.E.2d 1279 (Ind. Ct. App. 1980), *discussed in* text accompanying notes 90-95 *infra*.

[8]Pearson v. First Nat'l Bank of Martinsville, 408 N.E.2d 166 (Ind. Ct. App. 1980), *discussed in* text accompanying notes 121-29 *infra*.

[9]Robertson v. Mattingly, 413 N.E.2d 647 (Ind. Ct. App. 1980), *discussed in* text

the resolution of many important issues under the mechanic's lien statute;[10] the res judicata effect of the allowance of a creditor's claim in bankruptcy in a later suit against the bankrupt's creditor;[11] and many more decisions of importance in enforcing security interests, judgments, support orders, and rights in decedent's estates.[12] The 1981 legislature was busy mainly catering to the special interests of the lending industry.[13]

A. Secured Transactions

1. Land Title and Priority Problems.—Several decisions relating to title and priorities which may affect secured transactions involving real estate were decided, some very important. A conveyance of entireties property by one spouse was effective to bind the other non-joining party on a theory of laches after the grantee and its successor paid taxes and made improvements for nearly five years in *Wienke v. Lynch.*[14] Constructive knowledge of the entireties ownership appearing from the records showing that one entireties owner had failed to sign the deed did not defeat the right of a purchaser to assert laches against him.[15] According to *Baker v.*

---

accompanying notes 136-38 *infra.* This case teaches that if a sale is bad, hold it over again.

[10]Eight current decisions are discussed in the text commencing at note 139. For a complete review and summary of Indiana law on mechanics' liens, lawyers are advised to consult the 1981 manual on the subject published by the Indiana Continuing Legal Education Forum.

[11]Indiana Univ. v. Indiana Bonding & Surety Co., 416 N.E.2d 1275 (Ind. Ct. App. 1981), *discussed in* text accompanying notes 229-35 & 243-51 *infra.* The case involves important suretyship issues.

[12]In particular, note Siskind v. Siskind, 415 N.E.2d 771 (Ind. Ct. App. 1981), *discussed in* text accompanying notes 191-94 *infra.* This case considers exemption limits on garnishment of wages for support.

[13]Legislation dealing with title problems, conditional sales contracts, statutes of limitations, exemptions, enforcement of support orders and usury and lending authority will be briefly considered in the material which follows.

[14]407 N.E.2d 280 (Ind. Ct. App. 1980). The court recognized the rule that husband and wife have no separate interests in entireties property which during their lives may be conveyed by one without the other. A purchaser claiming through entireties ownership shown in the records must take notice of a conveyance by one of the spouses in the event the transfer has been authorized by the non-joining spouse. Beneficial Fin. Co. v. Wegmiller Bender Lumber Co., 402 N.E.2d 41 (Ind. Ct. App. 1980) (holding valid a mechanic's lien recorded in name of one spouse), *discussed in* Townsend, *Secured Transactions and Creditors' Rights, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 489, 503 (1981).

[15]The wife conveyed the entireties property without his signature and with the apparent knowledge of the husband. After a later divorce some five years after the conveyance, the husband brought a quiet title action against a purchaser of the grantee who acquired his interest ten months after the original deed. The court held that the time span for measuring laches related to the time the plaintiff learned of his

Chambers,[16] a conveyance to unmarried joint owners without further definitive language presumptively creates equal ownership in common among the grantees upon which a good faith purchaser from one may rely.[17] The case held that a conveyance to "*A* and *B*, husband and wife" does not create a survivorship title and that as between the parties, parol evidence is admissible to show unequal ownership and, in this case, that *A* who paid for the property did not intend to make a gift of any interest to *B*. Whether the interest is categorized as an easement or as an irrevocable license, the municipal owner of a water main buried deep in the ground pursuant to an unrecorded agreement with the owner was determined in *Industrial Disposal Corp. v. City of East Chicago*[18] to hold an unperfected interest in land which could be cut off by a bona fide purchaser. Unless recorded or discoverable by reasonable observation, the right to use the main constituted an unperfected interest in land. The court of appeals in *Kuchler v. Mark II Homeowners Association*,[19] determined that a "declaration of Covenants and Restrictions" containing restrictive covenants on all property then owned by the developmer-declarer and recorded in the miscellaneous records did not bind land previously and later platted where neither the plats nor the conveyances of lots thereunder referred to or incorporated the "declaration." Although the precise basis of the decision is not clear, the case seems to stand for the proposition that restrictions not included by express provision or reference in plats requiring approval of zoning officials will not be binding upon prior or subsequent purchasers of lots without knowledge of the plan.[20] An Indiana

---

claim and when he asserted it—not the time of reliance by the plaintiff. The court also determined that neither the defendant's constructive or actual knowledge of the plaintiff's claim would defeat the defense of laches which depended upon a discretionary balancing by the trial court of an assortment of equities. Finally, it should be noted that the equitable defense of laches was permitted against an action to quiet title which in Indiana is a legal cause of action.

[16]398 N.E.2d 1350 (Ind. Ct. App. 1980).

[17]The decision is supported by Brown v. Budd, 2 Ind. 442 (1850) which was not cited by the court.

[18]407 N.E.2d 1203 (Ind. Ct. App. 1980). The case holds in effect that an irrevocable license is an interest in land and is subject to the recording statutes. *Cf.* Residents of Green Spring Valley Subdivision v. Town of Newburg, 168 Ind. App. 621, 344 N.E.2d 312 (1976) (contract to provide sewer services in exchange for landowner's waiver of right to remonstrate against annexation subject to recording statute).
statute).

[19]412 N.E.2d 298 (Ind. Ct. App. 1980). The restriction at issue in this case provided for a homeowners' association which could levy assessments and a lien upon the various lots.

[20]*Id.* Two approved plats from which sales were made by the developer contained no reference to the involved restrictions which were recorded in the form of a "declaration" in the miscellaneous records. Hence the restrictions were not a part of

statute[21] barring unused mineral interests after twenty years unless a claim extending the interest is recorded within two years after the effective date of the act or before the expiration period was upheld as constitutional and effective.[22] The decision is important to mortgagees and vendor's lienholders whose claims are similarly barred by a non-claim statute.[23]

Priorities between contract purchasers from the same vendor became an oblique issue in *North v. Newlin*,[24] where the vendor contracted to sell the same land to successive purchasers. In a suit for specific performance by the first purchaser, the vendor argued that the remedy was improper because he could not convey title already committed by contract to another. The court denied the defense because the second purchaser was not a party, and his superior title was not affirmatively pleaded or proved. Thus an interesting priority question was avoided by a combination of poor pleading and an evasive opinion on the priority issue.[25] The court granted specific

---

the plats approved by zoning officials. Indiana law seems to require plat restrictions to be included in the plat which in turn must be approved by zoning officials. *E.g.*, IND. CODE § 18-7-5-52 (1976) (not cited in opinion). Since purchasers of lots under a plat acquired title limited only by those restrictions incorporated in the approved plat, the case seems to hold that they were not bound by the prior declaration which was not the subject of official approval. However, the court held that lot purchasers under a third plat which incorporated by reference the "declaration" were bound by the restrictions included thereunder.

There also is some question under Indiana law whether a convenant restricting use of an interest in land constitutes a recordable interest unless it relates to a conveyance, reservation, or known development plan. *Compare* Starz v. Kirsch, 78 Ind. App. 431, 136 N.E. 36 (1922) (covenant by adjoining owner to limit use of land held personal and not recordable) *with* Elliot v. Keely, 121 Ind. App. 529, 98 N.E.2d 374 (1951) (lot purchasers with knowledge bound by general unwritten and unrecorded development plan). In *Kuchler*, the court did not determine whether a developer selling lots with restrictions under a plat could increase the restrictions with respect to later sales through the "declaration" recorded after eleven lots had been sold. The court determined that the later unapproved "declaration" was not enforceable. 412 N.E.2d at 300.

[21]IND. CODE §§ 32-5-11-1 to -8 (1976).

[22]Short v. Texaco, Inc., 406 N.E.2d 625 (Ind. 1980), *prob. juris. noted*, 101 S. Ct. 1693 (1981).

[23]*E.g.*, *compare* IND. CODE § 32-8-4-1 (1976) *with* IND. R. TR. P. 63.1(A) protecting bona fide purchasers of property after statute of limitations has barred claim unless an extension because of tolling has been recorded. New bar and limitation statutes adopted in 1981 are discussed in the text accompanying notes 130-34 *infra*.

[24]416 N.E.2d 144 (Ind. Ct. App. 1981).

[25]In this case, apparently neither purchaser took possession or recorded his contract. The question then arose as to which purchaser should take priority. It is this writer's opinion that the rule "first in time, first in right" should have been applied. If the second purchaser had perfected by possession or recordation in good faith, he should have prevailed and specific performance denied to the first purchaser. *See* Townsend, *Secured Transactions and Creditors' Rights, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 234, 234-35 (1974) (discussing Indiana

performance in favor of the first purchaser.[26]

2. Conditional Sales Contracts—Real Estate.—Conditional sales contracts as a device for financing real estate transactions continue to spawn appellate litigation in Indiana. The rule of *Skendzel v. Marshall*[27] to the effect that a conditional seller cannot forfeit the conditional buyer who has paid a substantial part of the price (more than a minimal amount) was involved in three cases, one allowing forfeiture, the others requiring the seller to bring judicial foreclosure proceedings as in the case of mortgage foreclosure. In *Ebersold v. Wise*,[28] the purchaser had paid over $9,000 principal on a $21,000 contract with improvements of $3,000. Although the purchasers had failed to pay taxes because of misconduct by the seller, the court required judicial foreclosure. Strict forfeiture also was denied in *U. S. Aircraft Financing, Inc. v. Jankovich*[29] where the purchasers of a leasehold and buildings had long been in default but had paid $188,000 on a $300,000 obligation increased by $60,000 in waste and $82,000 in back taxes (forty-two percent of the price thus having been paid). The sale included buildings at an airport which were determined by the court to be personal property. Inasmuch as the seller had sought a remedy against both the buildings and leasehold, the court held that judicial foreclosure of the whole as real estate was permitted under the remedies provisions of Article 9 of the Uniform Commercial Code.[30] This law allows a secured party holding security in real and personal property to pursue remedies under the Code with respect to the personal property, or proceed with rights and remedies against both as if real estate. Strict forfeiture against the owner of a shell home was permitted in *Miles Homes of Indiana, Inc. v. Harrah Plumbing and Heating Service Co.*[31] There the seller of a shell home had taken a mortgage securing the price and, after later defaults, the mortgagor reconveyed to the mortgagee who resold it to the mortgagor on conditional sales contract for $8,300. The conditional buyer had paid approximately $1,200 in installments

---

authorities). In *North*, no evidence was offered establishing the second purchaser as a bona fide purchaser. 416 N.E.2d at 150.

[26]Since the decree of specific performance would have been worthless if in a later suit the second purchaser established priority, the court in the exercise of sound appellate practice could have returned the case for a new trial.

[27]261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974), *petition for writ of mandate denied*, 263 Ind. 337, 330 N.E.2d 747, *aff'd*, 264 Ind. 77, 339 N.E.2d 57 (1975).

[28]412 N.E.2d 802 (Ind. Ct. App. 1980).

[29]407 N.E.2d 287 (Ind. Ct. App. 1980).

[30]IND. CODE § 26-1-9-501(4) (1976).

[31]408 N.E.2d 597 (Ind. Ct. App. 1980). This case involved priorities between a conditional seller and the mechanic's lienholder, *discussed in* text accompanying notes 165-73 *infra*.

and made improvements of $3,600 for which a plumbing contract claimed a mechanic's lien. A decision of the lower court allowing foreclosure of the lien and denying forfeiture to the conditional seller was reversed. The court held that the buyer had forfeited his rights and that the lien of the mechanic rose no higher than the buyer's title.[32] The court failed to weigh into the amount paid the value of the improvements which would have given the debtor an equity of about fifty percent.

A unique aspect of the conditional seller's remedies was presented in *Powers v. Ford*[33] where the conditional buyer of a newspaper, including real estate and personal property, fell in default after paying over $53,000 on a $60,000 contract. The purchaser surrendered the property to the conditional seller who resold it at a private sale. The vendor then brought suit against the vendee for the difference between the unpaid purchase price and what was realized on the sale—in effect, an action for damages. The court held that since the contract allowed the vendor to retake the property and keep the payments made as liquidated damages, the repossessing vendor was barred from seeking damages or foreclosure because of an election of remedies.[34] Since under the rule of *Skendzel v. Marshall* an absconding vendee may be held to the forfeiture provision, in this case the provision which otherwise would not have been enforceable became controlling.[35] However, the rule works a hardship in that a defaulting vendee may abandon or turn possession over to the seller and escape a deficiency judgment. The conditional seller in such a case is put to a choice of taking possession and losing all other rights or allowing the property to remain vacant and seeking judicial foreclosure[36]—a position not unlike that of a lessor who may be bound by an election of remedies when he accepts surrender of the premises from a defaulting tenant.[37] Conditional vendors will be quick to avoid this problem by inserting a contractual provision allowing them alternative remedies upon the buyer's default including recovery on the debt by acceleration or as installments become due, judicial foreclosure, specific performance, or the usual forfeiture provisions all without regard to whether or not possession has been abandoned or surrendered to the vendor.[38] On the other hand,

[32]408 N.E.2d at 600-01.

[33]415 N.E.2d 734 (Ind. Ct. App. 1981).

[34]*Id.* at 736.

[35]*See id.* at 737 (concurring opinion).

[36]A similar choice had to be made by a conditional seller of personal property under old common law. *See* Igleheart Bros., Inc. v. John Deere Plow Co., 114 Ind. App. 182, 51 N.E.2d 498 (1943); Crute v. LaPorte Discount Corp., 89 Ind. App. 573, 167 N.E. 542 (1929).

[37]*See* Grueninger Travel Serv. v. Lake County Trust Co., 413 N.E.2d 1034 (Ind. Ct. App. 1980).

[38]*Cf. id.* (lease allowed repossessing landlord to relet and recover damages).

the supreme court could avoid much worry by treating all conditional sales as mortgages with the usual remedies available to mortgagees.

In other decisions, specific performance of an oral contract was granted to a purchaser who went into possession.[39] Parol evidence offered by a conditional seller showing that only a portion of the "$1,000.00 cash in hand upon the execution of this agreement, the receipt whereof by the Seller is hereby acknowledged," was excluded under the parol evidence rule in *Ebersold v. Wise*[40] despite a strong dissent.[41]

Legislation enacted in 1981 requires conditional buyers of real estate to record the contract or a memorandum thereof with the recorder if a property tax deduction is claimed. A copy must be furnished to the auditor who will assign a separate description and identification number to the parcel being sold under the contract.[42]

3. Secured Transactions in Personal Property—Description; After-Acquired Collateral.—The Uniform Commercial Code permits a security agreement to cover after-acquired collateral if the agreement so provides,[43] but after-acquired property so described need not be included in the financing statement.[44] Unless excluded by its terms, a security agreement automatically covers proceeds which can be traced from the collateral,[45] but coverage of proceeds in order to be perfected after ten days must be indicated in the financing statement.[46] The security agreement must describe the collateral,[47] but the financing statement need only indicate the types of collateral to be covered.[48] A financing statement may be filed before the

---

[39]Claise v. Bernardi, 413 N.E.2d 609 (Ind. Ct. App. 1980). A counterclaim by the vendor claiming breach of contract was held drawn into the equitable action and was not triable by jury. *Id.* at 613.

[40]412 N.E.2d 802 (Ind. Ct. App. 1980). *Cf.* First Fed. Sav. & Loan Ass'n v. Arena, 406 N.E.2d 1279 (Ind. Ct. App. 1980) (similar misapplication of the parol evidence rule), *discussed in* text accompanying notes 90-95 *infra.*

[41]412 N.E.2d at 807 (Garrard, P.J., dissenting).

[42]IND. CODE §§ 6-1.1-12-1 to -2 (Supp. 1981).

[43]IND. CODE § 26-1-9-204(3) (1976). The provision does not generally apply to crops becoming growing after one year from the time the security agreement is executed and to consumer goods acquired more than 10 days after value is given. *Id.* § 26-1-9-204(4).

[44]The leading case on the point is National Cash Register Co. v. Firestone & Co., 346 Mass. 255, 191 N.E.2d 471 (1963). *Accord*, American Nat'l Bank & Trust Co. v. National Cash Register Co., 473 P.2d 234 (Okla. 1970).

[45]IND. CODE § 26-1-9-306(3) (1976).

[46]*Id.*

[47]*Id.* §§ 26-1-9-203(1)(b), -110.

[48]A description in the financing statement is sufficient if it "contains a statement indicating the types, or describing the terms, [*sic*] of collateral." *Id.* § 26-1-9-402(1) ("items" in engrossed bill).

debtor executes a security agreement upon his collateral[49] and priorities against subsequent or other secured parties (other than purchase money security interests) who perfect by filing are determined in the order of filing.[50] Thus, suppose that *SP1* files a financing statement covering *D*'s "livestock" and proceeds. Later, *D* acquires the livestock and gives a non-purchase money security agreement covering the described livestock to *SP2*, who files a financing statement covering proceeds and livestock. Still later, *D* executes a security agreement covering the described livestock to *SP1*. *SP1* will take priority.[51] Reason: *SP1* was the first to file.

However, when a secured party claims a security interest in collateral acquired under but after execution of the security agreement, priorities will depend upon whether the security agreement covers after-acquired property or whether the collateral is proceeds of assets covered by the security agreement. Thus, in the above example, suppose that livestock covered by the original security agreement of *SP1* was sold by *D* and then *D* acquired additional livestock within the description of the security agreement. If *SP1's* security agreement covers after-acquired collateral of the same description, *SP1* will prevail over *SP2* who does not claim a purchase money security interest.[52] Likewise, *SP1* will take priority if he can trace proceeds from the original livestock to the new livestock.[53] However, if *SP1's* security agreement does not cover after-acquired livestock and if he is unable to trace proceeds into the new, *SP2* will take the collateral free of any claim of *SP1* providing *SP2's* security agree-

---

[49]"A financing statement may be filed before a security agreement is made or a security interest otherwise attaches." *Id.*

[50]*Id.* § 26-1-9-312(5)(a).

[51]*E.g.*, Allis-Chalmers Credit Corp. v. Cheney Inv., Inc., 227 Kan. 4, 605 P.2d 525 (1980).

[52]Since *SP1's* security agreement covers after-acquired livestock, *SP1* being first to perfect by filing would take priority over *SP2* who does not claim a purchase money security interest therein. National Cash Register Co. v. Firestone & Co., 346 Mass. 255, 191 N.E.2d 471 (1963); North Platte State Bank v. Production Credit Ass'n, 189 Neb. 44, 200 N.W.2d 1 (1972); *cf.* First Nat'l Bank of Elkhart County v. Smoker, 153 Ind. App. 71, 286 N.E.2d 203 (1972) (security interest of bank on after-acquired inventory upheld against seller). If *SP2* had taken a purchase money security interest in the after-acquired livestock and perfected within ten days after the debtor acquired possession, *SP2* would take priority. IND. CODE § 26-1-9-312(4) (1976). Livestock, if farm products, is not inventory. *Id.* § 26-1-9-109(3).

[53]Even if the security agreement of *SP1* does not cover after-acquired property, *SP1* will take priority if the later-acquired livestock was purchased with proceeds from the livestock covered by the security agreement. Jordan v. Butler, 182 Neb. 626, 156 N.W.2d 778 (1968) (security interest in cattle traced to cash proceeds and then to cattle purchased with cash and then to cash proceeds); Baker Production Credit Ass'n v. Long Creek Meat Co., 266 Ore. 643, 513 P.2d 1129 (1973) (secured party traced checks received by debtor in sale of cattle). Further compare Citizens Nat'l Bank v. Mid States Dev. Co., 380 N.E.2d 1243 (Ind. Ct. App. 1978) (security interest in inventory and accounts receivable traced to bank setoff).

ment covers the after-acquired livestock.[54] This very fact situation was presented in *Cargill, Inc. v. Perlich*[55] with an added twist. The court gave priority to *SP1* on the basis of the evidence which did not clearly establish whether the livestock subsequently disposed of by *SP2* was made up of original (covered by *SP1's* security agreement) or of subsequently acquired livestock—in this case, hogs. *SP2* had replevined and resold the disputed hogs, but inasmuch as no records were kept, the pigs could not be identified as being those covered by *SP1's* security agreement or those later acquired. The burden of going forward with the evidence shifted to *SP2* who was best able to identify the hogs seized under his temporary writ of replevin.[56] The court buttressed its opinion by applying section 9-108 of the Uniform Commercial Code which creates a presumption that after-acquired collateral is deemed to be taken for new value.[57] This provision, however, was not literally applicable because it applies only in favor of a secured party for new value whose security agreement covers after-acquired collateral.[58] But the decision does imply

---

[54]Tri-County Livestock Auction Co. v. Bank of Madison, 228 Ga. 325, 185 S.E.2d 393 (1971); *cf.* White v. Household Fin. Corp., 158 Ind. App. 394, 302 N.E.2d 828 (1973) (different rule for consumer goods).

[55]418 N.E.2d 274 (Ind. Ct. App. 1981).

[56]This rule requiring a converter to go forward with the evidence when proof establishes that he was the last possessor and in the best position to identify the goods or their quality was recognized and applied in Bottema v. Producers Livestock Ass'n, 366 N.E.2d 1189 (Ind. Ct. App. 1977). There the court applied a presumption that livestock converted was of the best or highest condition and value. In the *Cargill* case, *SP2* had procured possession of 237 animals under a preliminary replevin proceeding and sold the hogs before the replevin case ultimately decided that *SP1* had priority. Since the collateral was disposed of by a secured party—*SP2*—the burden of proving compliance with sales procedures under the Uniform Commercial Code was placed upon *SP2*. Whether proof established compliance did not appear in the decision, but damages were awarded on the basis of the price received by *SP2* at the sale.

[57]IND. CODE § 26-1-9-108 (1976) which provides:

> Where a secured party makes an advance, incurs an obligation, releases a perfected security interest, or otherwise gives new value which is to be secured in whole or in part by after-acquired property his security interest in the after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in such collateral either in the ordinary course of his business or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given.

This provision, aimed at protecting inventory and accounts receivable financers in bankruptcy, has been superceded by a new Bankruptcy Rule allowing the trustee to reach after-acquired collateral as a preference if the secured party's position is enhanced within the ninety day or other preference period. 11 U.S.C. § 547(c)(5) (Supp. III 1979) (applicable to inventory, receivable or proceeds thereof without definition).

[58]*SP1's* security agreements covered certain hogs as collateral including the "young, products and produce of the collateral," and proceeds. 418 N.E.2d at 277. Its prior financing statement covered "a purchase money interest in all livestock" on *SP2's* farms and proceeds. *Id. SP2's* security agreements covered certain types of hogs

that in the case of inventory and livestock financing, there is a presumption that replacement inventory or livestock constitutes proceeds when the original financing is for value. If so, the horrid burden of tracing collateral under this kind of financing is assisted by what amounts to a very sensible rule. The court held that *SP1's* security agreement describing the collateral as a "purchase money security interest in all livestock" was reasonably construed as including livestock securing non-purchase money loans, although it was not broad enough to include after-acquired property.[59]

a. Lease with option to purchase; goods left with seller.—A lease of refrigeration equipment was held to constitute a security agreement upon parol proof that the lessee could buy the equipment for $1.00 and sales taxes upon the completion of rental payments. The court in *Bolen v. Mid-Continent Refrigerator Co.*[60] applied the Uniform Commercial Code definition of a security agreement as including a lease when the lessee has an option to become the owner for "no additional consideration or for a nominal consideration."[61] *Bolen* is important because the option agreement was proved by parol—in this case by testimony of the lessor's sales representative and a shipping order.[62] As a security agreement, the transaction was subject to Article 9 remedies, and the lessor was permitted to recover a deficiency after repossession and resale under its provisions.[63]

---

and "all additions, substitutions, replacements, progeny and proceeds" under a prior financing statement covering "all swine now owned or hereafter acquired including any progeny, additions thereto or replacements thereof." *Id.* Thus, although *SP1's* security agreement and financing statement included proceeds, it is not fair to say that after-acquired hogs were covered either by the security agreement or financing statement. *SP2's* security agreement and financing statement were sufficiently broad to include both proceeds and after-acquired hogs. *Cf.* Whitworth v. Krueger, 98 Idaho 65, 558 P.2d 1026 (1976) (McFadden, C.J., concurring) (agreement giving security interest in cattle and "replacements therefor" created security interest in after-acquired cattle). *SP2* in this case furnished feed for the cattle. Even if *SP2* had retained a security interest in the feed, the fattened cattle would not have been "proceeds." First Nat'l Bank of Brush v. Bostron, 564 P.2d 964, 967 (Colo. Ct. App. 1977). The cattle may arguably have been a "product." *See* IND. CODE § 26-1-1-9-315 (1976).

[59]418 N.E.2d at 280.

[60]411 N.E.2d 1255 (Ind. Ct. App. 1980).

[61]*Id.* at 1258. The court held that the lessor's inclusion of the lease within its pleading eliminated the necessity of proof of execution absent denial under Indiana Trial Rule 9.2. *Id.* at 1257-58.

[62]*Id.* at 1258. While cases are divided on the allowance of parol proof of an agreement allowing the lessee to purchase for a nominal or reduced consideration, parol proof to show that a lease was intended as a security interest usually is considered. *Compare In re* Walter W. Willis, Inc., 313 F.Supp. 1274 (N.D. Ohio 1970), *aff'd*, 440 F.2d 995 (6th Cir. 1971) *with* Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co., 626 F.2d 401 (5th Cir. 1980) (oral option permitted absent integration clause in lease).

[63]411 N.E.2d at 1260.

An interesting problem of the rights of a buyer of goods that are being processed or manufactured by the seller in possession, and what such a buyer must do to protect itself, was presented in *Masson Cheese Corp. v. Valley Lea Dairies, Inc.*[64] where a manufacturer and seller of cheese had promised to sell its output to a buyer. In this situation the buyer runs several risks, particularly if he has paid for the goods or advanced funds before delivery. By allowing a seller to remain in possession, the transaction is presumptively fraudulent as against the seller's creditors and purchasers under the statute on fraudulent conveyances.[65] By permitting the seller who is a merchant who deals in goods of that kind to remain in possession, he empowers the seller to dispose of the goods to a buyer in ordinary course of business.[66] If the transaction is a sale or a contract to sell, the buyer cannot replevin the goods unless he can show grounds for specific performance or is unable to procure cover.[67] Should the transaction be construed as a security device, unless the buyer takes a security agreement and perfects he will be deferred to lien creditors, buyers, and secured parties under the rules of the Uniform Commercial Code.[68] In the *Masson Cheese Corp.* decision, the court of appeals found that the buyer had entrusted possession to a merchant and was defeated when the cheese was sold in ordinary course to a second buyer to pay a prior debt.[69] On this point, the court erred for the reason that the Code specifies that a buyer for an antecedent debt is not a buyer in ordinary course of business.[70] The concurring opinion chose to treat the transaction as a secured transaction.[71] Since the buyer did not perfect, the subse-

---

[64]411 N.E.2d 716 (Ind. Ct. App. 1980).

[65]IND. CODE §§ 32-2-1-7 to -8 (1976). Possession by a merchant seller in good faith and for a commercially reasonable time after sale or identification is not fraudulent. *Id.* § 26-1-2-402(2).

[66]*Id.* § 26-1-2-403(2).

[67]Under the Uniform Commercial Code, a buyer who does not get possession usually cannot get possession of the goods unless they are unique or he is unable to procure cover. *See* IND. CODE § 26-1-2-716 (1976). He has a limited right to repossess upon the seller's insolvency. *Id.* §§ 26-1-2-502, -402(1).

[68]*See id.* § 26-1-9-301. If the buyer takes a security interest in the goods to secure delivery, the price, or both, he has all the rights and disabilities of a secured party under Article 9. *See id.* §§ 26-1-2-402(1), (3) (1976). A buyer allowing the seller to remain in possession fits the pattern of the old chattel mortgage arrangement under which the mortgagee allowed the mortgagor-seller to remain in possession. Seavey v. Walker, 108 Ind. 78, 9 N.E. 347 (1886). Unless the mortgage was recorded, the transaction was a fraud on creditors. If the buyer holds a security interest, he can recover possession from the seller on default. IND. CODE § 26-1-9-503 (1976).

[69]411 N.E.2d at 719-20.

[70]IND. CODE § 26-1-1-201(9) (1976) providing that a purchase in ordinary course "does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt."

[71]411 N.E.2d at 720.

quent purchaser was entitled to priority because any purchaser taking possession and giving value (which includes a prior indebtedness) without knowledge will defeat an unperfected security interest.[72] The court did not consider the alternative that the transaction was presumptively a fraudulent conveyance. The case teaches one important lesson. A buyer allowing the seller to remain in possession for repair, processing or other reasons is wise to take a security agreement from the seller and perfect. As a secured party, he can recover possession on default[73] and if he perfects, he will be protected against creditors, secured parties and purchasers who do not qualify as buyers in ordinary course of business and will retain rights to proceeds and after-acquired collateral under the rules of Article 9.[74]

b. Remedies.—A repossessing secured party may resell the collateral at a public or private sale, and if he complies with the requirements of notice and conducts the sale in a commercially reasonable manner, he may recover a deficiency.[75] A recent decision illustrates proper sale procedure by the secured party where a deficiency was claimed. In *Bolen v. Mid-Continent Refrigerator Co.*,[76] evidence established a public sale justifying purchase by the lessor-secured party. A valid public sale was shown by publication of the sale in two local newspapers advertising public bidding with notice of the sale to the debtor's attorney who had appeared in the action prior to repossession.[77] Another decision recognized that a security agreement covering both real and personal property may be foreclosed against the whole as real estate.[78]

In the event that a secured party who has properly repossessed

---

[72]IND. CODE § 26-1-9-301(1)(c) (1976).

[73]*See id.* § 26-1-9-503.

[74]On this problem further compare *In re* Double H. Products Corp., 462 F.2d 52 (3d Cir. 1972) (United States allowed to recover goods being manufactured for it from seller's trustee in bankruptcy and given priority over secured lender—held United States not required to perfect under federal law applied to dispute).

[75]Hall v. Owen County State Bank, 370 N.E.2d 918 (Ind. Ct. App. 1977).

[76]411 N.E.2d 1255 (Ind. Ct. App. 1980), *discussed in* text accompanying notes 60-63 *supra.*

[77]In this case, it was determined that the lessor held a security interest. If this had not been a secured transaction, the reselling lessor apparently would not be allowed to recover a deficiency for future rent—at least in the absence of a lease provision for resale. *Cf.* Loudermilk v. Feld Truck Leasing Co., 171 Ind. App. 498, 358 N.E.2d 160 (1976) (where lease of trucks provided for repossession without termination of lease and lessor repossessed trucks, holding them available for use by lessee, lessor entitled to rent after repossession), *discussed in* Townsend, *Secured Transactions and Creditors' Rights, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 252, 268-69 (1978).

[78]U.S. Aircraft Financing Inc. v. Jankovich, 407 N.E.2d 287 (Ind. Ct. App. 1980), *discussed in* text accompanying note 29 *supra.*

collateral fails to dispose of it in compliance with Code provisions, he may still be allowed to recover a deficiency if he can show that the property was worth less than the amount of the indebtedness.[79] This rule, however, is qualified in the case of consumer goods. The Code allows the debtor whose assets have been improperly sold to recover not less than the amount of the finance charges plus ten percent of the price or original loan.[80] This rule was pointed out by the supreme court in *Van Bibber v. Norris*[81] where the court determined that the assignor of a security agreement was a party to what the court on appeal determined to be a proper repossession. However, the court allowed a retrial[82] for what seemed to be two reasons. One was that the house trailer which was the subject of the sale was not sold within ninety days after repossession as required by the Code where over sixty percent of the purchase price on consumer goods has been paid.[83] For this violation and any other disposal requirements of the Code the assignee-secured party was held potentially responsible for the penalty.[84] Apparently, too, liability would be allowed for a second reason—that the secured party had insolently converted personal, non-secured assets of the debtor in the trailer which was repossessed.[85] The court did not decide

---

[79]Hall v. Owen County State Bank, 370 N.E.2d at 928 (secured party in non-consumer transaction failed to give one of debtors notice of sale).

[80]IND. CODE § 26-1-9-507(1) (1976).

[81]419 N.E.2d 115 (Ind. 1981).

[82]The lower court had awarded separate damages against the assignor and assignee of the security agreement on the grounds of an improper repossession which the appellate court found to be proper. This problem is discussed in the text commencing at note 102. After repossession, the assignor-surety had paid off the assignee bank and thereafter disposed of the collateral in a manner which did not appear in the record. The court allowed a retrial of the damages against the assignor since it could not determine the extent to which they were based upon what the court below incorrectly found to be an improper repossession as opposed to an improper disposal of the collateral and other non-security assets of the debtor.

[83]IND. CODE § 26-1-9-505(1) (1976).

[84]The supreme court seemed to recognize the failure to give notice of the sale to the debtor would be a proper ground for damages. 419 N.E.2d at 127. The court observed that "notice of the resale" had been sent to the debtor by the assignee. *Id.* However, the statement of the facts in the case showed only that a notice of "repossession" had been sent by the assignee, and this to a known incorrect address. The notice could have been found inadequate for the latter reason alone. *See* Day v. Schenectady Discount Corp., 125 Ariz. 564, 611 P.2d 569 (Ariz. Ct. App. 1980). A general notice of sale is inadequate. *E.g.*, GEMC Fed. Credit Union v. Shoemake, 151 Ga. App. 705, 261 S.E.2d 443 (1979).

[85]Some of the contents had been destroyed in a fire for which it appeared that the assignor may or may not have been responsible. *Cf.* IND. CODE § 26-1-9-207 (1976) (secured party obligated to exercise reasonable care toward collateral in his possession). But others had been given by the assignor to relatives, and the proof established ill feelings of the assignor and the debtor.

whether the debtor could recover punitive damages in addition to the penalty provisions of the Code for improper resale procedures,[86] or for the independent conversion of debtor's personal assets which were not subject to Code procedures.[87] Nor did the court determine whether a deficiency judgment could be awarded to a secured party who improperly disposes of consumer goods—an issue which was not provoked by the facts. The court implicitly determined, however, that an assignee-secured party may escape responsibility to the debtor by transferring the function of resale to a paying, assignor-surety.[88] Whether this responsibility can be delegated to a non-paying surety or independent contractor remains unresolved, but in any event it seems unlikely that the assignee can escape his responsibilities in this way.

4. Transfers by Mortgagor or Lien Debtor.—A transferee of property on which there is a mortgage or other lien may promise to pay the indebtedness. In this case the lienholder may enforce his lien, and, as a third-party creditor, the beneficiary may enforce a deficiency against the transferee. The transferring debtor becomes a surety of the transferee who is the primary party. In Indiana, if the

---

[86]The Code specifically gives the debtor an "option" to recover in conversion or the penalty where the collateral is not disposed of within ninety days of repossession. IND. CODE § 26-1-9-505(1) (1976).

[87]Article 9 provisions of the Uniform Commercial Code come into play with respect to disposal of collateral after default. IND. CODE § 26-1-9-501(1) (1976). When non-security assets are involved, and probably when the secured party converts collateral prior to default, the debtor may proceed with his common law and statutory remedies which are not dealt with by the Code. *See* Townsend, *Secured Transactions and Creditors' Rights, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 310, 319 n.50 (1976).

[88]*Accord*, Community Management Ass'n v. Tousley, 32 Colo. App. 33, 505 P.2d 1314 (1973). *But cf.* Maas v. Allred, 577 P.2d 127 (Utah 1978) (bank responsible for acts of junior lien or title holder to whom possession returned); Western Nat'l Bank v. Harrison, 577 P.2d 635 (Wyo. 1978) (outright transfer to surety held a conversion). It seems that the assignee of the security interest would be responsible for wrongful acts of the non-paying assignor-surety for wrongfully repossessing or reselling the collateral with the assignee's assent. *In re* Webb, 17 U.C.C. Rep. 627 (Bankr. S.D. Ohio 1975); Farmers State Bank v. Otten, 87 S.D. 161, 204 N.W.2d 178 (1973). Some decisions recognize that pursuant to practice, a transfer to the surety-assignor may constitute a sale under the Code, and if there is no compliance with notice and other Code requirements, the debtor may hold both parties for wrongful acts with respect to that sale. Reeves v. Associates Fin. Serv. Co., 197 Neb. 107, 247 N.W.2d 434 (1976). *Cf. In re* Ford Motor Co., 27 U.C.C. Rep. 1118 (F.T.C. 1979) (involving practice of reselling to assignor as purchaser at a private sale). In *Van Bibber*, had a proper resale with notice to the debtor been made by the assignee to the assignore-surety, the assignee's subsequent disposal of the collateral would have been irrelevant. Shields v. Bobby Murray Chevrolet, Inc., 44 N.C. App. 427, 261 S.E.2d 238, *aff'd*, 300 N.C. 366, 266 S.E.2d 658 (1980). The *Van Bibber* court held that the re-transfer to the assignor-surety was not a sale or disposal, applying IND. CODE § 26-1-9-504(5) (1976).

transferee does not assume the indebtedness, he takes subject to the mortgage or lien, meaning that he assumes no liability on the indebtedness, but the secured property becomes the primary source of payment. In effect then the transferring debtor becomes a surety to the extent of the value of the collateral, but as to any deficiency he remains primarily liable. The transferee may lose the property to the secured party, but he cannot be held for a deficiency absent some breach of duty.[89] These principles were again recognized in *First Federal Savings and Loan Association v. Arena*,[90] where the mortgagor contracted to sell mortgaged land to a purchaser who in the contract promised to assume the mortgage. However, when the land was conveyed pursuant to the contract, the deed recited that the conveyance was "subject to" the mortgage. The case decided three important issues. First, it was held that the recital "subject to" in the deed merged the prior contract of the parties and excluded parol evidence as shown by the written contract that the transferee was to assume the mortgage.[91] Second, immediately after the transfer, the mortgagee extended time of payment to the transferee along with the transferee's agreement to pay increased interest.[92] This, the court held, released the original mortgagor as surety to the extent of the value of the collateral at the time of the release which was presumed to be the amount of the unpaid indebtedness.[93]

---

[89]These principles, along with the rule that the transferring lienholder does not escape his liability by transferring the collateral to an assuming buyer without a novation, were carefully considered in Boswell v. Lyon, 401 N.E.2d 735 (Ind. Ct. App. 1980), *discussed in* Townsend, *1980 Survey*, *supra* note 14, at 494-95.

[90]406 N.E.2d 1279 (Ind. Ct. App. 1980).

[91]*Id.* at 1281-82 & n.1. The decision followed Wayne Int'l Bldg. & Loan Ass'n v. Beckner, 191 Ind. 664, 134 N.E. 273 (1922). The weight of authority is to the contrary on this issue since the "subject to" language is a recital and not promissory in character, and proof establishes the consideration for the deed which is usually not integrated in a deed poll. McDill v. Gunn, 43 Ind. 315 (1873); McRae v. Pope, 311 Mass. 500, 42 N.E.2d 261 (1942); G. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES § 256 (2d ed. 1970). On this point, the case probably is wrong.

[92]406 N.E.2d at 1282. This follows the general rule that a binding agreement altering performances between principal and creditor without the assent of the surety will discharge the latter. For refinements of this rule, see American States Ins. Co. v. Floyd I. Staub, Inc., 370 N.E.2d 989 (Ind. Ct. App. 1977), *discussed in* Townsend, *Secured Transactions and Creditors' Rights, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 289, 318-19 (1979).

[93]The court followed Mutual Benefit Life Ins. Co. v. Lindley, 97 Ind. App. 575, 183 N.E. 127 (1932), which, in the case of a "subject to mortgage" transfer, held that the transferring mortgagor was a surety to the extent of the value of the collateral, but primarily liable as to any deficiency. If the value of the collateral at the time of the modification of the contract between the mortgages and the transferee is not proved, it is presumed to be the amount of the unpaid debt secured. *Id.* at 585, 183 N.E. at 130. In *Arena*, the issue of the value of the collateral was not raised in the appeal, which affirmed the decision below completely discharging the surety-transferring mortgagor.

Third, the original mortgage included a provision anticipating transfers by the mortgagor to the effect that the mortgagee "may, without notice to the Mortgagor, deal with . . . successors . . . in the same manner as with the Mortgagor, and may . . . extend time for payment . . . without discharging . . . the debt . . . ."[94] This waiver of suretyship defenses was interpreted as applicable only to extensions of time. Inasmuch as the mortgagee and the transferee had increased the interest rate on unpaid principal, the waiver was ineffective.[95] The binding agreement modifying the transferee's duty to pay interest discharged the obligation of the mortgagor to the extent that he was a surety.

Suppose that a mortgagor contracts to sell the mortgaged land to a purchaser on conditional sales contract. The purchaser agrees to make the installment payments under the mortgage, but fails to do so. Does the mortgagor-seller have a remedy against the purchaser? In *Claise v. Bernardi*,[96] the court held that the mortgagor-seller's remedy was limited to his contract damages. He could not recover in tort on a theory that the purchaser interfered with his contractual relation with the mortgagee, thereby injuring his credit.[97]

5. *Acceleration Provisions.*—Acceleration provisions in lien and loan agreements giving creditors the option of accelerating the remaining payments when a default occurs are tempered by principles of equity barring acceleration when the creditor accepts late payments or performances under the contract after a default. The creditor is estopped or deemed to have waived his right to enforce acceleration for the original and like defaults until he notifies the debtor of his intent to reinstate his option and gives the debtor a reasonable time in which to bring himself current.[98] The rule was

[94]406 N.E.2d at 1283.

[95]*Id.* For other decisions construing advance waiver of surety defenses, see Holmes v. Rushville Prod. Credit Ass'n, 170 Ind. App. 509, 353 N.E.2d 509, *modified on other grounds*, 170 Ind. App. 518, 357 N.E.2d 734 (1976), *transfer denied*, 267 Ind. 454, 371 N.E.2d 379 (1978) (advance consent to "any partial release of collateral" applied to proceeds of collateral); White v. Household Fin. Corp., 158 Ind. App. 394, 302 N.E.2d 828 (1973) (consent to release of collateral did not apply to release of insurance proceeds).

[96]413 N.E.2d 609 (Ind. Ct. App. 1980).

[97]The case raises interesting questions of the surety-transferor's remedies against an assuming transferee who fails to pay lien installments. If the transferor pays installments, he may recover reimbursement. If he pays in full, he may claim subrogation and accelerate the payments. He may not request the mortgagee to accelerate and foreclose under IND. CODE §§ 34-1-55-1, -2 (1976) (so-called rule of *Paine v. Packard*). Fensler v. Prather, 43 Ind. 119 (1873) (holding surety must have been such at inception of the contract). However, he may be wise to retain a separate lien or sell on conditional sale so that he may fully protect himself on default as in this case.

[98]In general, see cases discussed in Townsend, *1980 Survey*, *supra* note 14, at 497; Townsend, *1977 Survey*, *supra* note 77, at 261; Townsend, *1976 Survey*, *supra* note 87 at 315; Townsend, *Secured Transactions and Creditors' Rights, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 226, 231 (1973).

again recognized in *U.S. Aircraft Financing, Inc. v. Jankovich*[99] involving a defaulting buyer under a conditional sales contract. Acceptance of late payments, however, was held not to deny the conditional seller the right of acceleration for other and different defaults.[100]

Many "pig" type contracts and security agreements contain provisions to the effect that acceptance of late payments shall not estop the creditor from accelerating the indebtedness. Generally, the Indiana cases have recognized in effect that these types of contractual provisions negate the right of the parties to be governed by rules of fair play in the future and therefore are ineffective.[101] However, the Indiana Supreme Court in *Van Bibber v. Norris*[102] in overruling a careful decision by the court of appeals[103] and the court below held that contractual provisions of this sort may be rammed down the consumer's throat—even in a case where late payments were accepted fifty-seven times by a creditor from a debtor who had paid seventy percent of the purchase price. The court also held in effect that even supposing that late payments were waived by the creditor's conduct, other grounds for default were not.[104] One of these was the right reserved in the security agreement to declare a default under an insecurity clause.[105] In applying this provision, the court reweighed the evidence on appeal[106] and found that the acceleration was exercised in good faith despite evidence to the contrary. Another ground for default was a provision allowing optional acceleration in the case of transfer or an encumbrance—found in this

---

[99]407 N.E.2d 287 (Ind. Ct. App. 1980).

[100]*Id.* The court determined that while a waiver of late payments may have survived a letter addressed to the wrong debtor, acceleration for failure to pay taxes and insure the property provided alternative grounds for acceleration. The case did not indicate whether or not these breaches occurred before or after the acceptance of late payments. *Id.* at 292.

[101]*See* authorities cited at note 117 *infra.*

[102]419 N.E.2d 115 (Ind. 1981).

[103]404 N.E.2d 1365 (Ind. Ct. App.), *on rehearing*, 408 N.E.2d 1302 (Ind. Ct. App. 1980), *rev'd in part*, 419 N.E.2d 115 (Ind. 1981). This case was discussed in Townsend, *1980 Survey*, *supra* note 14, at 496-98.

[104]419 N.E.2d at 125. *Cf.* U.S. Aircraft Financing, Inc. v. Jankovich, 407 N.E.2d 287 (Ind. Ct. App. 1980) holding in effect that waiver of acceleration by acceptance of late payments did not constitute waiver of other grounds for acceleration.

[105]Under this provision, the secured party had the option to accelerate "for any reason deeming itself insecure." This provision must be exercised in good faith, and the burden of proving bad faith is upon the debtor. IND. CODE § 26-1-1-208 (1976).

[106]The court reweighed the evidence upon appeal and refused to consider all the circumstances against which the assignee bank's faith was to be determined, including the fact that no effort was made to contact the debtor in jail before the repossession. The court indulged in the presumption that if a debtor is in jail, the debt is impaired, leading to the untenable position that the bank had no duty to make further inquiry as to the whole circumstances. In this respect, the court erred. *See* Mineika v. Union Nat'l Bank, 30 Ill. App. 3d 277, 332 N.E.2d 504 (1975).

case from the fact that a mobile home park held a lien on the trailer for failure of the debtor to pay overdue rent.[107] The court failed to examine the many problems raised by "due on sale" clauses which have an abusive effect on debtors who need to sell or further encumber the property.[108]

Van Bibber v. Norris, in upholding the anti-waiver clause, is most unfortunate for several important reasons. First, the judge in effect overruled his own opinion in an earlier case without citing or considering it.[109] Second, the court failed fully to consider the oppressive character of anti-waiver or anti-estoppel clauses in contracts. These are seldom, if ever, fairly bargained, and are included as boiler plate in agreements prepared or drafted by the lending industry.[110] Third, the decision affects a whole line of cases which have ignored or invalidated such provisions in other contractual contexts.[111] Thinking men everywhere know that if *A* and *B* contract with each other they cannot agree not to bargain in the future—nor should they be able to fix a new statute of frauds or parol evidence rule for later, non-contemporaneous agreements and dealings. Fourth,

---

[107]"Sale or encumbrance" of the collateral was made a ground for declaring acceleration. The court failed to consider whether or not this provision, drafted by the lender, applied only when the sale or encumbrance is made with fraudulent purpose or intent to deprive the lender of its property.

[108]The Uniform Commercial Code permits voluntary or involuntary transfers of the debtor's interest notwithstanding a provision prohibiting transfer or making the transfer a default. Some scant authority has held that optional acceleration on transfer is permitted. Production Credit Ass'n v. Nowatzski, 90 Wis. 2d 344, 280 N.W.2d 118 (1979). Other decisions require the so-called "due on sale" clauses to be exercised in good faith and not for purposes of obtaining a greater rate of interest. Brown v. Avemco Inv. Corp., 603 F.2d 1367 (9th Cir. 1979); Wellenkamp v. Bank of America, 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978); Continental Fed. Sav. & Loan Ass'n v. Fetter, 564 P.2d 1013 (Okla. 1977). *See generally* 47 MISS. L. J. 331 (1976).

[109]Lafayette Car Wash, Inc. v. Boes, 258 Ind. 498, 502, 282 N.E.2d 837, 840 (1972) (under lease with anti-waiver clause, court stated that the acceptance of a late payment of rent would have waived the right to terminate the lease, and "if lessors' past acceptance of late rent payments had induced the vendees to neglect to pay the rent . . . when otherwise they would not have neglected to do so, lessors would be estopped from terminating the lease without notice on the grounds of late payment").

[110]This is a point of which the court should take judicial notice. *See, e.g.*, ICLEF & IND. STATE B. ASS'N, UNIFORM COMMERCIAL CODE FORMS, Forms 1-1 & 1-2 (1974).

[111]*E.g.*, Oxford Dev. Corp. v. Rausauer Builders, Inc., 158 Ind. App. 622, 304 N.E.2d 211 (1973) (contract prohibiting charge for "extras" unless agreed to in writing held waived by subsequent conduct); Foltz v. Evans, 113 Ind. App. 596, 49 N.E.2d 358 (1943) (contract stipulating that any modification must be in writing held to be modified verbally). Anti-waiver clauses have been held ineffective in conditional sales contracts of real estate. *E.g.*, Nelson v. Butcher, 170 Ind. App. 101, 352 N.E.2d 106 (1976); Pierce v. Yochum, 164 Ind. App. 443, 330 N.E.2d 102 (1975). Likewise, such clauses have been held ineffective in the case of leases. Rembold Motors, Inc. v. Bonfield, 155 Ind. App. 422, 293 N.E.2d 210 (1973).

such clauses are brutal to the home owner who has given a security interest in a trailer or mobile home—which was the fact in this case. Since under the Commercial Code this type of home owner can be dispossessed and foreclosed in a matter of a few days, the result is almost unthinkable in a humanitarian society.[112] Fifth, there is some question whether or not the repossession of a trailer-home, planned and executed while the owner is known to be in jail, is carried out without a "breach of the peace."[113] Had the owner been handcuffed by a third party while the home was repossessed by the lender, it stretches technicality to say that the repossession was peaceable—certainly not in good faith. Sixth, anti-waiver clauses will enable unscrupulous lenders to trick and coerce unsuspecting consumers to refinance at higher rates of interest—especially given the current situation in which interest rates are out of control. This has been the effect of "due on sale" clauses where the buyer is forced to refinance at higher rates.[114] Seventh, it stretches the imagination to suggest that a legitimate financial institution after continually accepting late payments fifty-seven times after seventy percent of the price had been paid, would in good faith accelerate and in a sneaky manner repossess the jailed debtor's home without giving him notice and an opportunity to bring himself current as under the precise circumstances of the case. All transactions under the Code are governed by a standard of good faith.[115] The bad faith in

---

[112]Foreclosure sale under a mortgage on real estate is prohibited until three months after the complaint is filed. IND. CODE § 32-8-16-1 (1976). No time limitations upon resale of goods or fixtures is fixed by the Uniform Commercial Code, except that the time must be commercially reasonable. IND. CODE § 26-1-9-504(3) (1976). However, the 1980 legislature accorded trailer homes the same exemption from execution as home owners. *Id.* § 34-2-28-1(a) (Supp. 1981).

[113]Repossession by self-help is permitted if completed "without a breach of the peace." *Id.* § 26-1-9-503 (1976). The fact that the debtor is in jail has been held insufficient to show a breach of the peace. Helfinstine v. Martin, 561 P.2d 951 (Okla. 1977). The duty of the secured party when the debtor is known to be incarcerated may, however, be increased. *Cf.* IND. CODE § 26-1-9-504(3) (1976) ("every aspect of the disposition . . . must be commercially reasonable").

[114]*See* note 108 *supra.*

[115]IND. CODE § 26-1-1-102(3) (1976) (obligation of good faith may not be disclaimed by agreement); *id.* § 26-1-1-203 ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.") The requirement of good faith applies to all accelerations. *See* Brown v. Avemco Inv. Corp., 603 F.2d 1367 (9th Cir. 1979). The court in *Van Bibber* determined that an assignee-banker is not a "merchant" within the meaning of Article 2 of the Code, which it held inapplicable to an assignee of the seller. Under Article 2, a merchant's standard of good faith includes the "observance of reasonable commercial standards of fair dealing in the trade" in addition to honesty in fact. *See* IND. CODE § 26-1-2-103(b) (1976). Why a banker should be held to a lesser standard than a merchant on financial matters growing out of a sale was left a mystery by the court.

this case was sufficiently shown to support the lower court award of actual and probably punitive damages.[116] Eighth, the decision will encourage lenders and other contracting parties to view the decision as opening the door to anti-waiver clauses and other provisions eliminating defenses arising out of subsequent conduct. This will put the ethical lawyer in a serious dilemma—to protect his client on one side and to draft a fair bargain on the other. Ninth, although the decision recognized a split of authority under the Commercial Code,[117] it failed to deal with the import of the Uniform Consumer Credit Code which recognizes a special rule of unconscionability to be applied in consumer transactions.[118] In fact, *Van Bibber* is supported by only one decision under the Commercial Code applying the anti-waiver clause against consumers, and that decision has been severely criticized by dissenting and disagreeing judges there.[119] Finally, if the court had outlawed the anti-waiver clause, no serious injury would flow to lenders. Balanced against the relative hurt to borrowers who find that they suddenly lose their property and credit standing because of an unsuspected repossession, the case makes no sense. Creditors may easily protect themselves by accepting late payments with a warning or by giving the debtor notice and a reasonable opportunity to bring himself current.[120]

---

[116]*See* Nicholson's Mobile Home Sales, Inc. v. Schramm, 164 Ind. App. 598, 330 N.E.2d 785 (1975), *discussed in* Townsend, *1976 Survey*, *supra* note 87, at 321; Nevada Nat'l Bank v. Huff, 582 P.2d 364 (Nev. 1978). However, punitive damages were properly denied where the fact-finder had found that the creditor was guilty of only a mistake in the law. Cobb v. Midwest Recovery Bureau Co., 295 N.W.2d 232 (Minn. 1980).

[117]Several decisions have denied effect to anti-waiver clauses in consumer transactions. Ford Motor Credit Co. v. Waters, 273 So.2d 96 (Fla. 1973) (creditor estopped from asserting default); Vines v. Citizens Trust Bank, 146 Ga. App. 845, 247 S.E.2d 528 (1978) (separate notification to bring debtor current waived); Fontaine v. Industrial Nat'l Bank, 111 R.I. 6, 298 A.2d 521 (1973) (unconscionable). Only one decision was found upholding the anti-waiver provision in a consumer transaction. This was McAllister v. Langford Investigators, Inc., 380 So.2d 299, 300 (Ala. Civ. App. 1980) (disapproving Hale v. Ford Motor Credit Co., 374 So.2d 849 (Ala. 1979) (three judges dissenting)). Anti-waiver clauses have been upheld in the case of commercial loans in Illinois and Kentucky, neither of which involved self-help repossession. General Grocer Co. v. Bachar, 51 Ill. App. 3d 907, 365 N.E.2d 1106 (1977); Universal C.I.T. Credit Corp. v. Middlesboro Motor Sales, Inc., 424 S.W.2d 409 (Ky. 1968).

[118]IND. CODE § 24-4.5-5-108 (1976). Under this provision, official comments make it clear that the standard of conscionability is to be determined by conduct acceptable between a businessman and a consumer—not between merchants. UNIFORM CONSUMER CREDIT CODE § 5.108, Comment 1.

[119]*See* Hale v. Ford Motor Credit Co., 374 So.2d 849 (Ala. 1979).

[120]*See* Wade v. Ford Motor Credit Co., 455 F. Supp. 147, 24 U.C.C. Rep. 1040 (E.D. Mo. 1978) where the creditor gave continual reminders to the debtor to pay up. The anti-waiver clause was not needed to support a finding of no waiver or estoppel.

As noted below, the court of appeals has indicated that destruction of the collateral may have the effect of accelerating the indebtedness when insurance proceeds covering the loss and payable to them as their interests appear are received. *Pearson v. First National Bank*[121] held that the mortgagee could keep and apply the proceeds to the indebtedness as it became due unless the debtor could show bad faith by the lienholder or some equitable basis entitling the debtor to rebuild or refurbish the property with the proceeds.[122]

6. Right of Lien Debtor to Apply Insurance Funds Towards Repair of the Collateral.—Suppose that a lien debtor under a mortgage or security agreement procures property insurance covering both the debtor and the lienholder when neither the policy nor the lien contract specify how the proceeds are to be applied. Upon damage or destruction of the collateral, may the debtor insist that the proceeds be used to repair or replace the collateral? May the lienholder insist upon a refinancing at a higher rate of interest? In *Pearson v. First National Bank*[123] the court construed a mortgage provision requiring insurance payable in favor of the mortgagees "as their interest may appear" as allowing the bank to apply the insurance proceeds to the indebtedness as it becomes due.[124] After a careful review of the few decisions on the point in other states, the court denied relief to the mortgagor because of failure to prove lack of good faith[125] on the part of the mortgagee or other grounds requiring application of the funds towards rehabilitation of the property. The case indicated that relevant proof would have included evidence of whether the debtor was current upon the indebtedness;[126] facts showing estoppel by the bank when reconstruction was com-

---

[121]408 N.E.2d 166 (Ind. Ct. App. 1980).

[122]*Id.* at 170-71.

[123]*Id.* at 166.

[124]*Id.* at 170. Prior Indiana law was to the effect that if the indebtedness is overdue or accelerated, the lienholder may insist that insurance proceeds be applied first towards the indebtedness. Commercial Union Fire Ins. Co. v. Wade, 103 Ind. App. 461, 8 N.E.2d 1009 (1937).

[125]408 N.E.2d at 171. The court cited Schoolcraft v. Ross, 81 Cal. App. 3d 75, 146 Cal. Rptr. 57 (1978) holding that an express provision giving the lienholder the option of applying the proceeds to the balance of the debt or for reconstruction carried an implied condition that the option be exercised in good faith. This seemed to be construed to mean that if the lienholder's security remained unimpaired either before or after the reconstruction, refusal to allow the proceeds to be used for this purpose would be in bad faith. In the *Pearson* case no evidence was introduced on the value of the collateral either before or after the projected construction. 408 N.E.2d at 171.

[126]408 N.E.2d at 170. *Accord*, Cottman Co. v. Continental Trust Co., 169 Md. 595, 182 A. 551 (1936).

menced after the fire; and the amount of insurance proceeds paid or credited to the debtor, and how or if the mortgage was retired.[127] If the debtor was in effect seeking specific performance of an implied obligation to allow application of the proceeds toward rehabilitation of the collateral, the court was correct in requiring proof of damages or that damages would not have afforded an adequate remedy.[128] The case thus does not subscribe to the unreasonable view that a mortgage or security agreement silent upon the subject will allow the lienholder to accelerate and apply insurance proceeds payable to both parties toward the debt. It indicates that the lien debtor may obtain relief if he is not in default and can show damages or a need for specific equitable relief. Most policy provisions give the insured the option to repair or pay damages, and terms of mortgages or security agreements carefully drafted by lienholders give the latter the option of accelerating and application towards the total debt.[129]

7. *Mortgage Foreclosure—Statute of Limitations.*—New statutes of limitations and bars or non-claim provisions with respect to real estate mortgages were enacted in 1981. Title lawyers are advised that mortgages and vendors' liens created on September 1, 1982 and thereafter shall expire ten years after the maturity date of the last installment as shown of record (prior thereto, twenty years).[130] The statute of limitations on mortgages continues to be ten years,

---

[127]408 N.E.2d at 170-71.

[128]*Id.* at 170. The court seemed to assume that if the debtor could have refinanced reconstruction at a lower rate of interest elsewhere, the debtor suffered no damages from the mortgagee's refusal to make the funds available for repair. But if he was forced to pay an increased rate of interest, it seems that he would be entitled to damages. *See* Doddridge v. American Trust Sav. Bank, 98 Ind. App. 334, 189 N.E. 165 (1934). While equity will not generally grant specific performance of promises to lend money, it will do so where the plaintiff can show that money is not available or that he would suffer undue hardship. *See* Standard Land Corp. v. Bogardus, 154 Ind. App. 283, 289 N.E.2d 803 (1972). The court thus seems to leave the door open to damages or equitable relief depending upon the circumstances. It would be unfair to require the lienholder to suffer repairs if his security will be or continue to be impaired by the improvement. Thus if repairs would leave his indebtedness in a less secured state than before the loss, allowing the repairs would be in the nature of waste. *Cf.* Finley v. Chain, 374 N.E.2d 67 (Ind. Ct. App. 1978) (waste measured by extent of impairment of security below amount of debt). On the other hand, if the debtor finds it difficult to obtain financing for needed repairs so that he will be unable to have a home or to continue a business, equities predominate in his favor.

[129]*Cf.* Savings Soc'y Commercial Bank v. Michigan Mut. Liab. Co., 118 Ohio App. 297, 194 N.E.2d 435 (1963) (election by insurer—notice to debtor sufficient).

[130]IND. CODE § 32-8-4-1 (Supp. 1981). This statute is a bar to recovery and will protect good faith purchasers relying upon the record after the time period has expired despite any tolling which is not shown of record. *See* Citizens Bank v. Mergenthaler Linotype Co., 216 Ind. 573, 586, 25 N.E.2d 444, 450 (1940).

presumably from the time each installment becomes due,[131] but the limitation for suing upon the written money debt is changed from ten to six years after August 31, 1982.[132] The effect will be to restore the old Indiana rule recognizing two causes of action for limitations purposes: one on the debt and another on the security.[133] The catch-all limitation period has also been reduced by the same legislation from fifteen to ten years commencing on September 1, 1982.[134]

B. Creditors' Rights

1. Artisans' Liens.—An artisan with a possessory lien for labor, materials, and a storage lien upon a motor vehicle may sell the property under statutory provisions allowing the sale at public auction after thirty days, the insertion of two weekly advertisements in a newspaper, and the sending of a registered mail notice to the owner at his last known address indicating that the property will be sold at public sale within fifteen days of mailing.[135] In *Robertson v. Mattingly*[136] an artisan who had furnished repairs and storage for over two years sold the vehicle to a purchaser without compliance with the statute. So that a certificate of title could be obtained,[137] the artisan later resold it to the original buyer, this time after compliance with statutory procedures. The buyer then procured a new certificate of title and the car was ultimately sold to a successive seventh purchaser from whom the original owner sought recovery. The sale was upheld upon proof of compliance with the statute and that notice to the owner was timely sent (though not necessarily received).[138] The case mainly teaches that strict compli-

---

[131]IND. CODE § 34-1-2-2(6) (Supp. 1981).

[132]*Id.* § 34-1-3-2(5). A special rule applies to written contracts to pay money between September 19, 1981 and September 1, 1982 where the limitation is fixed at ten years, and contracts executed before September 19, 1981 are enforceable only under the limitations period in effect at the time of execution.

[133]Yarlott v. Brown, 192 Ind. 648, 138 N.E. 17 (1923).

[134]IND. CODE § 34-1-2-3 (Supp. 1981). No provision applies to security interests in personal property, but "chattel mortgages" are excluded from real estate mortgage provisions of the new law. *Id.* § 34-1-2-2(b). This exclusion indicates that the statute does not apply to liens on fixtures and personal property.

[135]IND. CODE § 9-9-5-6 (1976). Another statute also recognizes the artisans' liens and provides for judicial foreclosure one year from the time of recordation of notice of the lien. *Id.* § 32-8-31-5.

[136]413 N.E.2d 647 (Ind. Ct. App. 1980).

[137]IND. CODE § 9-9-5-6 (1976) (providing for the issuance of a new certificate of title on the artisan's "certificate" showing compliance with the sales provision of the statute).

[138]The court also emphasized that an agent of the owner was notified of the sale, and showed concern for his long delay in asserting his rights. The court did not decide an issue of the statute of limitations.

ance with sales procedures will pay off to the artisan who forecloses, and that if a bad sale is made, it can be corrected by a complying resale.

2. Mechanics' Liens—General Duties of Parties; Punitive Damages.—Parties to a construction contract are expected to perform their obligations. If they do not, an intentional breach of contract or duty may result in punitive damages, as reflected in recent decisions. An owner, however, has no duty to pay a subcontractor without a mechanic's lien. In this connection, *Harper v. Goodin*[139] held that a sub filing a mechanic's lien after the sixty day required period for asserting the lien and then refusing to release it could be held liable in a common law action for disparagement of title.[140] Damages included the cost of attorney's fees in clearing title and punitive damages as well.[141] An owner or contractor who wrongfully withholds retainages intentionally causing injuries to the obligee's credit may be held liable for punitive damages under a ruling in *Southern, School Buildings, Inc. v. Loew Electric, Inc.*[142] This kind of liability was also extended to a contractor intentionally breaching his contract.[143]

a. Notice to occupying owner by subcontractors.—Current provisions of the mechanic's lien statute require subcontractors claiming a lien against an occupying owner of a single or double dwelling to give him written notice of intent to claim the lien within thirty days after performance commences (sixty days in the case of new construction).[144] In *Henderlong Lumber Co. v. Zinn*,[145] a supplier gave the notice a few months after the time had expired. The supplier claimed a lien for only those materials furnished after the

---

[139]409 N.E.2d 1129 (Ind. Ct. App. 1980).

[140]The court recognized that the mechanic wrongfully refusing to release the lien could be held liable for a statutory penalty as provided by statute. IND. CODE §§ 32-8-1-1 to -2 (1976). The statutory remedy was not exclusive.

[141]The mechanic defended on the ground that his refusal to release the lien was based on advice of counsel, but the defense was held not to be established by proof that the disparagement was made with knowledge that the lien was ineffective. 409 N.E.2d at 1132, 1134-35.

[142]407 N.E.2d 240 (Ind. Ct. App. 1980) (refusal to submit instruction on punitive damages prejudicial error justifying new trial).

[143]F.D. Borkholder Co., Inc. v. Sandock, 413 N.E.2d 567 (Ind. 1980) (building constructed in latent deviation from plans); *see* Harper v. Goodin, 409 N.E.2d 1129 (Ind. Ct. App. 1980); *cf.* Orto v. Jackson, 413 N.E.2d 273 (Ind. Ct. App. 1980) (owner allowed damages for aggravation and inconvenience in counterclaim to foreclosure action and this was not barred by owner's settlement with subcontractor for the same defect).

[144]IND. CODE § 32-8-3-1 (Supp. 1981). Prior to its amendment, the statute required the notice to be sent within five and fourteen days, respectively. *See* Act of March 16, 1963, ch. 376, § 1, 1963 Ind. Acts 963.

[145]406 N.E.2d 310 (Ind. Ct. App. 1980).

notice had been given. The court held that since the notice had not been given *within* the statutory time from *commencement*, the supplier could not meet the condition of the lien statute.[146] An attempt to argue that deliveries were made under separate contracts occuring after the notice had been given was rejected as being raised for the first time on appeal. Had the argument been supported by proof and timely made, it would have found support in a dubious line of cases refusing to tack successive performances under separate contracts on the same construction project.[147]

b. Recordation of notice.—A mechanic claiming a lien upon real estate must record notice of his intent to claim the lien within sixty days after the last performance.[148] The lien then relates back to the time the work first commenced.[149] If the notice is not recorded within the prescribed time, the lien and the accompanying right to recover attorney's fees[150] are lost.[151] Two decisions rejected liens for failure of the recorded notice to meet statutory requirements. In *Froberg v. Northern Indiana Construction, Inc.*,[152] the court denied attorney's fees to a prime contractor whose notice described a tract of land other than that on which the work was performed.[153] *Suburban Electric Co. v. Lake County Trust Co.*[154] held that designation of a general partner by name as owner-contractor in the notice recorded by a materialman was inadequate to bind real estate held of record in the name of the partnership.[155] This technical result was justified on the theory that the notice provision was designed to inform the owner and subsequent purchasers.[156] A notice which would not in fact give accurate notice to subsequent purchasers did not meet the requirements of the statute—even though the record in the case did

---

[146]*Id.* at 312.

[147]Thus, if a prime contractor or subcontractor renders performances under separate contracts upon a single construction project, it has been held that the notice of the lien must be recorded within sixty days of the last performance for each contract. Tacking is not permitted. *See* Saint Joseph's College v. Morrison, Inc., 158 Ind. App. 272, 302 N.E.2d 865 (1973), *discussed in* Townsend, *1974 Survey*, *supra* note 25, at 253 (1974). Logically, this highly questionable interpretation of the law would require notices by subcontractors to the owner within the thirty or sixty day period from the commencement of performances under each separate contract.

[148]IND. CODE § 32-8-3-3 (1976).

[149]*Id.* § 32-8-3-5.

[150]*See id.* § 32-8-3-14.

[151]*See id.* § 32-8-3-3.

[152]416 N.E.2d 451 (Ind. Ct. App. 1980). The prime contractor, however, recovered upon his contract with the owner.

[153]*Id.* at 454.

[154]412 N.E.2d 295 (Ind. Ct. App. 1980).

[155]*Id.* at 297.

[156]*Id.*

not show prejudice to a third party who acquired title a short time after the defective notice was recorded.[157]

c. Priorities.—A lien or property interest properly perfected will, as a general rule, take priority over a mechanic who later commences construction work on the property.[158] An exception to this rule is recognized when proof establishes that the prior lienholder has actively consented to the construction improvement.[159] Active consent has been found on the part of a joint owner making part payment to the contractor,[160] an unenforceable promise by an owner to convey land to a person furnishing materials and work on the property,[161] and where the prior owner or lienholder participates in the construction project.[162] A landlord's agreeing to improvements was also deemed evidence of active consent.[163] If a mortgage or lien is taken on property with a view that the proceeds of the loan will be used for an improvement on the property, the law is not clear whether giving the construction loan constitutes active consent.[164] Leaning in the direction that it does not is *Miles Homes of Indiana, Inc. v. Harrah Plumbing and Heating Service Co.*[165] where a seller furnished a shell house to the owner of land who gave a mortgage on the land to secure the price. To make the property livable as expected by the lender, the owner-debtor contracted with a mechanic

---

[157]The lien in this case was claimed by a subcontractor who dealt with a prime contractor represented by a general partner of the owning partnership. The partnership-owner conveyed the property to a trust while the work was in progress, but the deed was not recorded until one hour and forty minutes after notice of the lien was recorded. The court made an assumption which in view of the record was completely unjustified: i.e., that the trust changed its position because the record failed to show the lien. In this case, the notice of the lien was accompanied by a document (deed) showing the partnership as owner, but the court held that the attachment did not cure the defect in name.

[158]*E.g.*, Woods v. Deckelbaum, 244 Ind. 260, 191 N.E.2d 101 (1963).

[159]*E.g.*, Rader v. A.J. Barrett Co., 59 Ind. App. 27, 108 N.E. 883 (1915).

[160]O'Hara v. Architects Hartung & Assocs., 163 Ind. App. 661, 326 N.E.2d 283 (1975).

[161]Martin v. Martin, 122 Ind. App. 241, 103 N.E.2d 905 (1952) (wife orally agreed to convey land to entireties ownership in exchange for improvements by husband who claimed a lien upon property).

[162]Better Homes Co. v. Hildebrand Hardware Co., 202 Ind. 6, 171 N.E. 321 (1930).

[163]Dallas Co. v. William Tobias Studio, Inc., 162 Ind. App. 213, 318 N.E.2d 568 (1974) (reversing summary judgment for landlord).

[164]It has been held that a construction lien may be deferred to later mechanics' liens. *See* Farmers Loan & Trust Co. v. Canada & St. L. Ry., 127 Ind. 250, 26 N.E. 784 (1890); Building & Loan Ass'n v. Coburn, 150 Ind. 684, 50 N.E. 885 (1898). A construction loan made after mechanics have commenced work will be deferred to mechanics liens. Beneficial Fin. Co. v. Wegmiller Bender Lumber Co., 402 N.E.2d 41, 403 N.E.2d 1150 (Ind. Ct. App. 1980), *discussed in* Townsend, *1980 Survey*, *supra* note 14, at 504-06 (1981).

[165]408 N.E.2d 597 (Ind. Ct. App. 1980).

for installation of plumbing, and this mechanic duly asserted a lien against the property. In reversing the lower court which allowed the lienholder to foreclose with priority, the court held that the interest of the seller of the shell home should prevail.[166] Why active consent to make a shell home livable could not be inferred is unfathomable.

Another exception to the rule giving prior liens and interests superiority over subsequent mechanics' liens is a statutory provision allowing removal of "buildings erected by the lienholder" as against lessors and mortgagees.[167] *Miles Homes* found that this statutory exception was inapplicable for two reasons. One was that the building was not erected by the mechanic claiming the lien,[168] a dubious interpretation which will not work when several persons contribute to the construction of a building. The other reason was that the seller of the shell building had become a conditional seller of the land, and, since conditional sellers were not excepted by the statute, the exception did not apply.[169] Evidence showed that originally the owner-debtor had given the seller of the house a mortgage on the land for the price, and upon later defaults, the property was conveyed to the seller who then resold it to the owner on conditional sales contract. Although the decision below could clearly be sustained on the theory of a fake sale amounting to a mortgage,[170] the court determined that the seller had the rights of a conditional seller of the land. The court stretched the law a little further by allowing the so-called conditional seller strict foreclosure because nothing had been paid on principal.[171] The court failed to consider the value of improvements made by the owner and the mechanic amounting to nearly one-half of the original purchase price.[172] As a consequence the mechanic was foreclosed without an opportunity to assert even a

---

[166]*Id.* at 600-01.

[167]IND. CODE § 32-8-3-2 (1976).

[168]408 N.E.2d at 601.

[169]*Id.* at 600. This accords with Davis v. Elliott, 7 Ind. App. 246, 34 N.E. 591 (1893), holding that the exception did not include vendors.

[170]*See* Kerfoot v. Kessener, 227 Ind. 58, 84 N.E.2d 190 (1949) (applying well established rule that outright deed may be proved as an equitable mortgage, especially when the property is resold on security to the debtor). *See generally* Townsend, *1974 Survey*, *supra* note 25, at 311-12 (1974).

[171]408 N.E.2d at 600. The court held that the case fell within an exception to Skendzel v. Marshall, 261 Ind. 226, 301 N.E.2d 641 (1973), which requires judicial foreclosure of conditional sales contracts of real estate when a substantial equity exists in the debtor. *Id.*

[172]Counting payments which had been made and the value of improvements established in the record, the debtor and the mechanic had added over one-half of the value of the indebtedness in payments and value added to the land. *Id.* at 598-99. *See generally* text accompanying notes 31 & 32 *supra*.

secondary lien on the property since he stood in the shoes of the owner-debtor. The case is a complex manipulation of difficult security concepts aided by a reweighing of the evidence on appeal.[173]

d. Waiver of lien.—That a contractor may waive its rights to a mechanic's lien was established in *King Pin Motor Lodge, Inc. v. D. J. Construction Co.*[174] There the agreement to waive the lien was executed in favor of the bank which apparently furnished financing on the strength of the waiver. The court held that the waiver bound the contractor with respect to the owner as well, so that when recovery for extras was allowed, the contractor was denied attorney's fees.[175]

e. Foreclosure of mechanic's lien; notice to bring suit.—By statute, time limits for foreclosure of mechanics' liens are severely prescribed. Suit must be brought within one year[176] and the owner may expedite this time period by giving the lienholder written notice to commence suit.[177] If the lienholder fails to bring suit within thirty days after receiving this notice, the lien (not liability on contract) is "null and void."[178] In *Lafayette Tennis Club, Inc. v. C.W. Ellison Builders, Inc.*,[179] a subcontractor who properly recorded notice of its lien was served with an unregistered and uncertified letter from the owner complaining that an itemized account had not been furnished with the following directions: "Please file suit on your Mechanic's Lien which you filed in order that the matter may brought to a head."[180] No response was made to the letter and suit to foreclose the lien was commenced more than thirty days after receipt of the notice. In an unusually harsh holding, the court focused upon the second paragraph of the statute stating that an owner who has given such notice by "registered or certified mail to the holder of the lien at the address given in the notice of lien recorded *may* file an affidavit" to this effect and that the thirty day period had elapsed.[181] Ignoring that this provision was added by legislative amendment obviously to expedite and secure the clearance of titles when mechanics' lienholders have undetermined claims, the court

---

[173]This conclusion is supported by the dissent of Judge Young. 408 N.E.2d 597 at 601 (Young, J., dissenting).

[174]416 N.E.2d 1317 (Ind. Ct. App. 1981).

[175]*Id.* at 1319.

[176]Suit must be brought within one year of the time the notice of lien is recorded or within one year of the time that credit is given and written terms thereof are executed by the lienholder and all owners of record. IND. CODE § 32-8-3-6 (1976).

[177]IND. CODE § 32-8--3-10 (1976).

[178]*Id.*

[179]406 N.E.2d 1211 (Ind. Ct. App. 1980).

[180]*Id.* at 1212.

[181]*Id.* at 1213-14, *quoting* IND. CODE § 32-8-3-10 (1976) (emphasis added). This second paragraph was added in 1963. Act of March 16, 1963, ch. 376, § 4, 1963 Ind. Acts 963.

seemed to hold that the notice must be sent by certified or registered letter, that an affidavit of service must be recorded, and that the written notice must prominently explain to the sendee that his foreclosure action will be barred if suit is not commenced within thirty days.[182] The notice and the manner of its service were held insufficient to require foreclosure within thirty days of its receipt. The case has a virtue—it is accompanied by a dissent.[183]

3. Exemptions.—By statute, it is now clear that the exemption provision of the Uniform Consumer Credit Code allowing creditors to reach twenty-five percent of disposable weekly earnings above thirty times minimum hourly wages with an exemption of the balance is valid.[184] Doubt arising from the fact that the proceedings supplemental statute allowed a continuing lien upon only ten percent of earnings and income[185] was eliminated by an amendment to that statute permitting non-exempt property to be applied to the judgment debt with a lien upon income and profits to the extent permitted by the Code.[186] This new statute also provides that the judgment debtor must be "notified" of a hearing before the court can order property, income or profits applied towards the judgment in proceedings supplemental,[187] overruling *Citizens National Bank v. Harvey*[188] on this point. The exemption of life insurance was extended to protect a beneficiary or an assignee spouse against a creditor of the spouse as well as the insured, and loan values as well as cash surrender values were made exempt.[189]

4. Enforcement of Property Division and Support Orders.—The statute limiting garnishment of weekly wages to twenty-five percent of disposable earnings allows more to be reached in the case of "alimony" or "support" if the decree specifies a higher percentage.[190] This provision of the law seemingly was repealed by *Siskind*

---

[182]406 N.E.2d at 1214-15.

[183]*Id.* at 1215. Similar to the statute involved in this case is a rule of suretyship to be found in IND. CODE §§ 34-1-55-1 to -2 (1976) which allows a surety to demand in writing that a creditor bring suit against the principal. If suit is not prosecuted promptly and with diligence, the surety is discharged. *See* text accompanying notes 247-48 *infra.* For a case in which a notice by the surety similar to that used in *Lafayette Tennis Club* was upheld, compare Reiman v. Terre Haute Sav. Bank, 96 Ind. App. 652, 180 N.E. 490 (1932).

[184]IND. CODE § 34-1-44-7 (Supp. 1981) (validating *id.* § 24-4-4.5-5-105 (1976))

[185]Doubt became serious when an opinion of the Attorney General resurrected Mims v. Commercial Credit Corp., 261 Ind. 591, 307 N.E.2d 867 (1974) holding that a debtor was entitled to the most liberal exemption provided by different statutes.

[186]IND. CODE § 34-1-44-7 (Supp. 1981).

[187]*Id.*

[188]167 Ind. App. 582, 339 N.E.2d 604 (1976), *criticized in* Townsend, *1976 Survey, supra* note 87, at 330-33.

[189]IND. CODE § 27-1-12-14(c) to (d) (Supp. 1981).

[190]IND. CODE § 24-4.5-5-105 (Supp. 1981).

v. Siskind,[191] which held that the twenty-five percent limitation upon disposable earnings does not apply to an alimony or support decree even if the decree fails to specify that more may be garnished. Under this interpretation, the effect seems to be that one hundred percent of a defaulting spouse's wages could be garnished to satisfy a back property division or for support payments when the decree is silent as to the amount of disposable earnings to be reached.[192] Fortunately, this hideous result is tempered by federal law which limits garnishment of wages for "support" to 50, 55, 60 and 65% of disposable earnings, depending upon the support and delinquency status of the debtor.[193] To the extent that the decree involved property division, it may have been in violation of federal law permitting garnishment of not more than twenty-five percent of weekly disposable earnings towards payment of non-support judgments.[194] In *Budnick v. Budnick*,[195] it was made clear that a divorce award of attorney's fees to the attorneys could be enforced by them in proceedings supplemental to execution.[196] *Rohn v. Thuma*[197] decided that a husband could not be punished in contempt for failure to pay uncertain undefined college expenses awarded by a support decree—at least until the court determined whether the decree should be construed to include college expenses at institutions more costly than a state university.[198]

---

[191]415 N.E.2d 771 (Ind. Ct. App. 1981).

[192]In this case the court allowed garnishment of 55% of the husband's wages (disposable earnings) to satisfy a variable rate alimony decree in arrears. *Id.* at 772.

[193]15 U.S.C. § 1673(b)(2) (Supp. III 1979).

[194]The federal law exempts the lesser of 25% of weekly disposable earnings or the amount by which weekly disposable earnings exceed 30 times minimum wages with the further provision allowing only 50, 55, 60 or 65 per cent of weekly disposable earnings to be reached for "support." 15 U.S.C. § 1673 (1976). Hence, under federal law it appears that not more than 25% may be reached for property division which is determined not to be "support" under Indiana law. *See generally* Townsend, *Creditor Problems Growing out of Alimony, Support, and Property Settlement Decrees*, in [ICLEF] *Rights and Remedies of an Indiana Creditor in 1980*, V-3, V-19 to V-23 (1980). Therefore, the award in *Siskind* of 55% was illegal under federal law if the order was for property division and if it is so regarded under the federal law. The court called it "alimony." 415 N.E.2d at 772. Actually, the decree involved a property settlement providing for both support and property division in lump sum payments every month. Hence the decree may have been in compliance with federal law—at least to the extent that the payment was for "support" if that portion of the amount owing was included in the 55% ordered to be paid. This opinion lays the groundwork for future trouble.

[195]413 N.E.2d 1023 (Ind. Ct. App. 1980).

[196]Fees may be awarded directly to attorneys in divorce proceedings. *See* IND. CODE § 31-1-11.5-16 (1976). In this case, the court determined that the appeal from proceedings supplemental was in bad faith, justifying a penalty of ten percent.

[197]408 N.E.2d 578 (Ind. Ct. App. 1980).

[198]Contempt for failure to pay uncontested dental bills was allowed. Another recent decision holds that contempt for failure to pay support is proper even though

The power of the court to include pension rights as marital property in divorce awards appeared again in several decisions. *Wilson v. Wilson*[199] concerned a pension payable absolutely but only when the husband reached a certain age. After reviewing the array of conflicting Indiana decisions on the problem, the court determined that the pension was not vested and therefore not distributable as a marital asset.[200] Another decision recognized that gift transfers by a spouse with intent to defeat marital assets may be considered in reducing the donor's share of the assets on property division.[201]

New law was made, or at least an old problem of enforcement was clarified, in *Clark v. Clark*,[202] holding that a spouse allegedly in contempt of a court order could be arrested on a body attachment without prior notice and hearing on the contempt charge.[203] Legislation in 1981 provides that the court may, on application, order interest to be paid at one percent per month on delinquent child support payments.[204]

5. *Proceedings Supplemental to Execution.*—Two recent decisions, both involving issues of res judicata, illustrate that a judgment creditor may enforce his judgment against a liability insurer by means of garnishment of the insurer in proceedings supplemen-

---

some but not all the children for which support has been ordered are emancipated. Reffeitt v. Reffeitt, 419 N.E.2d 999 (Ind. Ct. App. 1981) (holding also that agreement between husband and wife reducing payments ineffective until approved by court for prospective operation).

[199]409 N.E.2d 1169 (Ind. Ct. App. 1980).

[200]*Compare* Morgan v. Cooper, 415 N.E.2d 729 (Ind. Ct. App. 1981) (excluding pension rights from marital assets as "future income" and not vested) *with* Irwin v. Irwin, 406 N.E.2d 317 (Ind. Ct. App. 1980) (unvested pension could be considered but not divided). The present divorce law defines property as "including a present right to withdraw pension for retirement benefits." IND. CODE § 31-1-11.5-2(d) (Supp. 1981). Pension rights payable in the future and contingent upon survival are not a part of the estate in bankruptcy. *In re* Harter, 10 Bankr. 272 (Bankr. N.D. Ind. 1981), *discussed at* note 236 *infra*.

[201]Melnik v. Melnik, 413 N.E.2d 969, 973 (Ind. Ct. App. 1980).

[202]404 N.E.2d 23 (Ind. Ct. App. 1980).

[203]*Id.* at 37-38. It seems that old case law held that before the defendant charged with civil contempt could be subjected to a body attachment, he must have been served with notice and given an opportunity to appear at the hearing and found in contempt. Denny v. State, 203 Ind. 682, 695-96, 182 N.E. 313, 317-18 (1932). Legislation adopted in 1947 seems to make it clear that the court in contempt proceedings may direct body attachment either before or after the hearing on contempt. *See* IND. CODE §§ 34-4-9-1 to -3 (1976) (applying to both civil and criminal contempt proceedings). A body attachment to procure witnesses who refuse to honor a properly served subpoena is proper. *See* IND. R. TR. P. 45(F) & (G). However, before a body attachment may issue, it seems that it must be based upon affidavit or proof establishing probable cause for the charge. *See* IND. CODE § 34-1-10-10 (1976); Thomas v. Woollen, 255 Ind. 612, 266 N.E.2d 20 (1971); Carey v. Carey, 132 Ind. App. 30, 171 N.E.2d 487 (1961). Whether or not this was the case in *Clark v. Clark* is unclear.

[204]IND. CODE § 31-6-6.1-15.5 (Supp. 1981).

tal. In *Snodgrass v. Baize*,[205] a judgment based on negligence against the insured from which the defending insurer withdrew because of a conflict of interest was held not binding upon the insurer who defended on the ground that the policy did not cover the judgment creditor's claim.[206] The garnishee insurer was allowed to prove as a defense that the claim was based on an intentional tort which was not covered by the policy. The insurer successfully argued that if it had defended the position, it would be taking positions both for and against the client. The effect is that in any case where the liability insurer denies liability on the policy, it can not properly represent the insured as to issues at war with its undertaking. The insurer's defense thus must be litigated separately, and this may be done in proceedings supplemental if the defense is preserved. In this case the insurer paid for the insured's defense by another lawyer who represented the insured. In *United Farm Bureau Mutual Insurance Co. v. Wampler*[207] the court found that a declaratory judgment in favor of the insurer determining that it was not liable on the policy before judgment was not binding upon the judgment creditor who was not a party to the proceeding.[208] Both cases indicate that the liability insurer who denies liability on its policy to the insured may and possibly should make its defense in proceedings in which the insured beneficiary is named as a party.[209] If proper steps are taken to avoid waiver or estoppel as in these cases, the insurer is entitled to raise the defense in proceedings supplemental.[210]

As noted above, an attorney awarded fees in divorce or support

---

[205]405 N.E.2d 48 (Ind. Ct. App. 1980).

[206]*Id.* at 55.

[207]406 N.E.2d 1195 (Ind. Ct. App. 1980).

[208]*Id.* at 1197. The insured had filed a third party complaint against the insurer to determine that the insurer was liable, and the insurer was granted a severance of the trial on that issue. Thereafter the insured was defaulted on the negligence action and the declaratory judgment action was dismissed. *Id.* at 1196-97.

[209]*See* 406 N.E.2d at 1197; 405 N.E.2d at 55. Defenses may not be raised after the hearing in proceedings supplemental. American Underwriters, Inc. v. Curtis, 392 N.E.2d 516 (Ind. Ct. App. 1979). Defenses of a garnishee probably should be pleaded. Travelers Ins. Co. v. Madison Superior Court, 265 Ind. 287, 354 N.E.2d 188 (1976). The insurer must affirmatively raise defenses on the policy in proceedings supplemental, and in an appropriate case is entitled to jury trial. 406 N.E.2d at 1197-98. In the rehearing of Snodgrass v. Baize, 409 N.E.2d 645 (Ind. Ct. App. 1980), the court held that the insurance beneficiary carried the burden of proving liability on the policy, but once the policy was offered in evidence, the insurer carried the burden of going forward with the evidence showing non-coverage. The court apparently applied Indiana Trial Rule 9(C). For another decision where liability of the insurer was determined in a declaratory judgment suit, see Indiana Lumbermens Mut. Ins. Co. v. Brandum, 419 N.E.2d 246 (Ind. Ct. App. 1981) (insured intended to injure *A* and injured *B*—act not "intentional" as to *B*).

[210]In both cases the prompt action of the insurer denying liability appeared to negate waiver or estoppel.

proceedings may enforce the judgment by proceedings supplemental to execution.[211]

6. Receiverships—Life Insurance Liquidation.—The Indiana insurance law giving priority in insurance company liquidations to policyholders was interpreted as excluding "reinsurers" by *Foremost Life Insurance Co. v. Department of Insurance.*[212] The Indiana Supreme Court denied subrogation to the rights of policyholders paid by it to an insurer under whose name the insolvent issued policies so that it could do business in other states, although under the agreement between them the entire risk was born by the insolvent company. The decision construed the arrangement between the insurance companies as one of "reinsurance" and overruled in part a careful decision by the court of appeals[213] which attempted to remove some of the mystique surrounding the concept of "reinsurance." The mystique remains.

7. Creditors' Rights in Decedents' Estates.—The dead man's statute[214] does not apply to make a vendee, seeking specific performance of a contract to purchase entireties property, incompetent to testify as to transactions with the deceased spouse.[215] The survivor against whom the action was brought was determined not to be an "heir" in *Summerlot v. Summerlot.*[216] A claim filed against a decedent in his name before the running of the statute of limitations but amended by naming a special representative of the decedent thereafter was upheld in *Eberbach v. McNabney*[217] as a procedural matter governed by Trial Rule 15(C).[218] This rule relates the amendment back to when the correct party was informed of the action within the limitation period. On the other hand, the same judges in *General Motors Corp. v. Arnett,*[219] where the wife filed a wrongful death action within the two year period allowed for wrongful death actions, held that her appointment as special representative after the time had expired did not relate back under the Rule. The latter holding represents the absurd struggle in which form sometimes prevails over substance, and pays no compliment to the law or its profession.[220]

---

[211]*See* notes 195-96 *supra* and accompanying text.

[212]409 N.E.2d 1092 (Ind. 1980).

[213]395 N.E.2d 418 (Ind. Ct. App. 1979), *discussed in* Townsend, *1980 Survey, supra* note 14, at 517 (1981).

[214]IND. CODE § 34-1-14-6 (1976).

[215]*Id.*

[216]408 N.E.2d 820 (Ind. Ct. App. 1980).

[217]413 N.E.2d 958 (Ind. Ct. App. 1980). Suit was apparently filed against the representative as permitted under IND. CODE § 29-1-14-1(f) (1976).

[218]413 N.E.2d at 962.

[219]418 N.E.2d 546 (Ind. Ct. App. 1981).

[220]The court failed to apply Trial Rule 17(A) to this case through the rule was clearly applicable. The case also overlooked Holmes v. Pennsylvania N.Y. Cent. Transp. Co., 48 F.R.D. 449 (N.D. Ind. 1969) (reaching a contrary result). The court also failed to

Two recent decisions, *Key v. Sneed*[221] and *In re Kingseed*,[222] hold that income from specifically devised assets of a decedent passes to the personal representative as a general asset of the estate to be used in paying administration expenses or even swelling the rights of other beneficiaries at the expense of the specific devisees. *Kingseed* also holds that a devisee in possession of specifically devised property is accountable for the rental value of the property until distribution, but wisely allows the personal representative to make early distribution of this and other property without a court order.[223] These decisions taking away income from specifically devised property before distribution raise an unanswered problem when the specifically devised asset is subject to a mortgage or lien. Must income from such property be applied towards the payment of liens upon the property? The problem is complicated by the fact that specifically devised property upon which there is a lien passes subject to the encumbrance unless the testator indicates otherwise.[224] While the probate code allows the representative to pay all or part of the lien upon estate property with prior court approval,[225] case law indicates that the lienholder may insist on application of income from the encumberd property toward his lien if the lien instrument so provides.[226] The position of the representative is further complicated by the fact that *Kingseed* indicates that he is under a duty to keep installment payments current in order to avoid acceleration or default of lien property,[227] but makes it clear that he may avoid ongoing responsibility for current payments by making prompt distribution of the lien property to the specific devisee—preferably

recognize that the widow and beneficiaries are the real party in interest in a wrongful death action despite the technical requirement that suit be brought by the decedent's representative. *See* Pettibone v. Moore, 223 Ind. 232, 59 N.E.2d 114 (1945). The decision was based in part on the outmoded notion that actions for wrongful death are not a part of the common law. *But cf.* Carlson v. Green, 100 S. Ct. 1468 (1980) (federal common law allows survival of constitutional civil rights actions in Indiana).

[221]408 N.E.2d 1305 (Ind. Ct. App. 1980).

[222]413 N.E.2d 917 (Ind. Ct. App. 1980).

[223]413 N.E.2d at 924 (upholding retroactive approval of early distribution). The court held that for occupancy or possession prior to the time the distribution is made, the devisee is responsible and may be held to pay rent for the use of the property. *Id.* at 926-27.

[224]IND. CODE § 29-1-17-9 (1976).

[225]*Id.* § 29-1-14-20.

[226]In receivership proceedings, the lienholder is entitled to income from mortgaged property when the mortgage so provides. Hemstock v. Wood, 113 Ind. App. 112, 44 N.E.2d 1016 (1943).

[227]*Kingseed* held the representative accountable for failure to lease assets and collect rent. It seems to follow that if he defaults on a mortgage, allowing the mortgagee to insist on higher interest, he may incur liability for the loss. *Cf.* IND. CODE § 29-1-14-3 (1976) (claims due at future date payable at present value or to be secured by funds or bond of distributee); *Id.* § 29-1-14-16 (foreclosure of lien on land stayed for five months after death).

after obtaining a court order.[228]

8. Bankruptcy.—A surety who directed its creditor to file a claim in the principal's bankruptcy was not bound on principles of res judicata or issue preclusion for contesting the amount of the claim allowed in bankruptcy in a later suit by the creditor in state court. The surety in *Indiana University v. Indiana Bonding & Surety Co.*[229] was permitted to prove that the creditor sustained loss of only $19,000 although the creditor's claim for the same loss was allowed for nearly $30,000 in the principal's bankruptcy.[230] Since the claim was uncontested in bankruptcy, the allowance of the claim there was not even treated as evidence of the amount owing by the principal to the creditor, although the court recognized that a contested judgment by the creditor against the principal ordinarily would be admitted as prima facie evidence against the surety who was not a party.[231] The court also determined that the surety's act of directing enforcement of the creditor's claim in the principal's bankruptcy did not estop the surety from challenging the amount allowed, mainly because the surety had no opportunity to defend or participate in the bankruptcy proceedings.[232] Under the Bankruptcy Code[233] it is

---

[228]The representative may and probably should make timely payments of current installments on lien property. He is protected if he first obtains a court order or if he later obtains court approval. Baker v. Happ, 114 Ind. App. 591, 54 N.E.2d 123 (1944). After a court order, he may abandon encumbered property. IND. CODE § 29-1-13-8 (1976).

[229]416 N.E.2d 1275 (Ind. Ct. App. 1981).

[230]The creditor in the case was Indiana University which was protected by a bond governing the faithful performance of the principal which supplied food to the Indianapolis campus through vending machines. The case demonstrated that the University had no satisfactory means of ensuring accurate accounting of sales by the vendor.

[231]416 N.E.2d at 1285. The judgment for the creditor is allowed as rebuttable evidence in a later suit against the surety unless it was obtained by default or by confession. RESTATEMENT OF SECURITY § 139 (1941). However, the surety on judicial bonds usually is concluded by a judgment rendered against the principal in the judicial proceeding. *See* Ross v. Felter, 71 Ind. App. 58, 123 N.E. 20 (1919). Liability of the surety on judicial bonds may be enforced on motion. *See* IND. R. TR. P. 65.1. It seems that a judgment in favor of the creditor against the surety will not bind the principal who is not a party unless he is given an opportunity to defend. *Cf.* IND. CODE § 34-1-55-7 (1976) (default judgment by surety forbidden if he knows of defense and principal defends after furnishing indemnity); Michener v. Springfield Engine & Thresher Co., 142 Ind. 130, 40 N.E. 679 (1895) (judgment by a creditor against a surety was reopened after the principal successfully defended the claim against the same creditor).

[232]The decision involved a 1971 bankruptcy which is not covered by the Bankruptcy Code effective October 1, 1979. The court cited authority under pre-Code law which narrowly restricted the persons who could object to claims. One argument for denying res judicata effect in bankruptcy proceedings to the allowance or denial of a claim by the principal is that this will deny the creditor or surety a right to trial by jury on the issue resolved. For a holding to the contrary, see Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (determination for SEC in equity-suit binding party in later civil suit did not deny right to trial by jury); Katchen v. Landy, 382 U.S. 323 (1966).

[233]As to jurisdiction of the bankruptcy court over civil proceedings arising in "or

now clear that the bankruptcy court has jurisdiction to litigate collateral issues relating to the bankruptcy, and determination of a surety's rights with respect to the creditor filing a claim are drawn into the authority of the bankruptcy court.[234] Hence, under the Code it seems logical that a surety who urges the creditor to file the obligation secured in bankruptcy should be bound by the allowed claim on principles of agency or estopped from claiming that the award is too large when the surety has an opportunity to challenge the claim, and to be made a third party by intervention or as a defendant.[235] Hence, a creditor whose claim is secured by a surety should join the surety as a third party defendant if he wishes to avoid double litigation and run the risk of inconsistent judicial determinations. Under the Code, the courts probably will no longer protect a surety who advises his creditor to sue or file a claim and then seeks to mitigate the damage award. In all events, the creditor may avoid the problem by making the surety a party.

In other decisions, the bankruptcy court in the northern Indiana district has determined that pension rights payable in the future and contingent upon survivorship do not pass as "property" to the bankrupt's estate, but like future wages and earnings remain with the bankrupt.[236] Another important case in the southern Indiana district dealt with the right of a bankrupt to avoid non-possessory, non-purchase money liens on household goods, jewelry, tools of the trade and health aids.[237] A lender consolidating or refinancing loans was disallowed the right to claim that all or some of the debts were purchase money loans unless his security agreement provided that payments on consumer credit sales would be applied in the order prescribed by the Uniform Consumer Credit Code.[238] Decisions coming

---

related to cases under" the Code, see 28 U.S.C. § 1471 (Supp. III 1979). Further compare *In re* Lucasa Int'l Ltd., 6 Bankr. 717 (S.D.N.Y. 1980) (third party suit against guarantor proper).

[234]11 U.S.C. § 502 (Supp. II 1978) (allowing party in interest, including creditor of a partner, to object to allowance of claims).

[235]*Compare* RESTATEMENT OF JUDGMENTS § 85 & 93, comment e (1942) *with* Bankr. R. 306(c) (allowing objection to allowance of a claim) *and* Bankr. R. 714 (allowing third party practice) *and* Bankr. R. 724 (allowing intervention).

[236]In two decisions, the court held that army and naval retirement benefits payable in the future and contingent upon survival are not "property." *See In re* Harter, 10 Bankr. 272 (Bankr. N.D. Ind. 1981); *In re* Haynes, 9 Bankr. 418 (Bankr. N.D. Ind. 1981). In the first cited case, the court pointed out that while Congress exempted benefits of the Veteran's Administration, Medal of Honor winners, railroad retirement benefits, social security payments, military pay annuities and others, no exemption is given army retirement pensions. The second case noted that since pensions are not marital property, pensions are not "property" in the bankruptcy sense.

[237]Mulcahy v. Indianapolis Morris Plan Corp., 3 Bankr. 454 (Bankr. S.D. Ind. 1980).

[238]IND. CODE § 24-4.5-2-409 (1976).

down hard on the very poor were followed by Judge Rodibaugh in denying approval of a Chapter 13 plan to a plasterer with a monthly salary of $600 and a gross income of $3,300 who proposed to pay nothing under the plan.[239] The court determined, in effect, that a poor person cannot propose a plan in good faith.

9. Suretyship. The promise of a surety as general rule must be supported by consideration, and when signed with the principal, the consideration moving to the principal or from the creditor will support his promise. *Davis v. B.C.L. Enterprises, Inc.*[240] held that a surety's promise made after the contract between the principal and creditor (in this case a tenant and his landlord) will not be binding absent other consideration. The case recognized that such a promise would be enforceable if the original agreement was signed on the understanding that the guaranty would be forthcoming, but the decision did not take the forward step of recognizing that the requirement of consideration in such cases is a formality which should be eliminated.[241] The case also failed to note that lack of consideration is an affirmative defense under the Indiana trial rules,[242] and was in error if its decision upholding the lower court was based simply on the fact that the suretyship agreement was dated after the original contract was signed.

Indiana University v. Indiana Bonding & Surety Co.[243] and *First Federal Savings and Loan Association v. Arena*[244] recognized and applied the rule that a binding agreement between principal and creditor altering the principal's duty of performance under the contract will discharge a non-assenting surety.

Both of these cases involved provisions waiving suretyship defenses. In *Indiana University*, the surety bond provided that no modifications of the guaranteed contract shall affect the obligation of the surety.[245] An extension and modification of the contract between the principal vending company and the creditor-university did not release the surety. In *First Federal Savings & Loan*, a provision

---

[239]*In re* Hurd, 6 Bankr. 329 (Bankr. N.D. Ind. 1980).

[240]406 N.E.2d 1204 (Ind. Ct. App. 1980).

[241]A negotiable instrument given for the prior debt of any person is enforceable under the Uniform Commerical Code which also defines such a debt as value. *Compare* IND. CODE § 26-1-3-408 (1976) *with id.* § 26-1-1-201(44).

[242]IND. R. TR. P. 9.1(C) provides: "When an action or defense is founded upon a written contract or release, lack of consideration for the promise or release is an affirmative defense, and the party asserting lack of it carries the burden of proof."

[243]416 N.E.2d 1275 (Ind. Ct. App. 1981).

[244]406 N.E.2d 1279 (Ind. Ct. App. 1980), *discussed in* text accompanying notes 90-95 *supra.*

[245]416 N.E.2d at 1282. A companion bond covering the vending company's operation in Bloomington did not contain the waiver provision.

authorizing the mortgagee to extend time to successors of the mortgagor was construed as inapplicable to alterations of the rate of interest.[246]

Indiana University also dealt with the rights of a creditor who complies with the written request of a surety to bring suit against the principal under the statutory rule of *Pain v. Packard*.[247] Under this rule as adopted in Indiana, the surety is discharged unless the creditor, having received notice to sue the principal, sues the principal and prosecutes the case through execution with dispatch. The rule is a beneficial device to rid the surety of a contingent liability against a defaulting debtor and a dilatory creditor.[248] As noted previously,[249] the court held that the surety was not bound by the amount of the claim allowed the creditor against the principal in bankruptcy proceedings, mainly because the amount was not litigated in bankruptcy and because the court determined that the surety could not become a party to defend its interest in bankruptcy. However, in most cases involving attempts to comply with *Pain v. Packard*, the surety may be and usually is named as a party defendant.[250] If he is not made a party, he should not be allowed to relitigate the issues which he has invoked by pressing for judicial proceedings in which he is represented and may intervene.[251]

While the promise of a surety ordinarily falls within the Statute of Frauds,[252] *Shane Quadri v. Goodyear Service Stores*[253] recognized that a third party beneficiary promise in which the promisor purports to pay his own obligation for the beneficiary is not within the statute. There an insurer orally directed a car-leasing company to furnish an automobile to an insured and also to pay for repairs on the rented car. The undertaking was found not to be a promise to pay the debts of another within the Statute of Frauds.

---

[246]406 N.E.2d at 1283.

[247]The Indiana statute codifying the rule is IND. CODE §§ 34-1-55-1 to -2 (1976). Unlike the original case of Pain v. Packard, 13 Johns. 174 (N.Y. 1816) which discharged the surety only to the extent of damage resulting from the failure to prosecute the principal, the Indiana statute absolutely discharges the surety if the creditor fails to sue and prosecute through collection with diligence.

[248]It avoids the technical problems of exoneration, the only remedy by which the surety can resolve his troubled position without paying the creditor. *See* Hunter v. First Nat'l Bank, 172 Ind. 62, 87 N.E. 734 (1909); Barnes v. Sammons, 128 Ind. 596, 27 N.E. 247 (1891).

[249]*See* text accompanying notes 229-35 *supra*.

[250]L. SIMPSON, HANDBOOK ON THE LAW OF SURETYSHIP 179 (1950).

[251]RESTATEMENT OF JUDGMENTS § 85 (1942) (person represented in litigation bound by rules of res judicata). The surety by requesting suit parallels the position of one vouched into litigation. *See* Uniroyal, Inc. v. Chambers Gasket & Mfg. Co., 380 N.E.2d 571 (Ind. Ct. App. 1978).

[252]IND. CODE § 32-2-1-1 (1976).

[253]412 N.E.2d 315 (Ind. Ct. App. 1980).

C. *Miscellaneous Cases and Legislation*

Inability of the landlord to obtain financing did not excuse him from a convenant requiring him to rebuild a leased building completely destroyed by fire,[254] a result at war with inflation and probably reason.[255] The responsibility under a sour mortgage participation agreement was construed and resolved in favor of a supervising mortgagee releasing a mortgage during the course of construction.[256] Release of the lien for inheritance taxes by the five year limitations period after death was construed not to bar the personal liability of the personal representative and distributees under a former statute,[257] and the rule of the case has been codified in the succeeding law.[258] Two cases involved violations of and the disclosure requirements of the Truth in Lending Act and the Uniform Commercial Code. In one, a consumer loan taken on all the debtor's after-acquired household goods without qualification was determined to be in violation of applicable law[259] because under the Uniform Commercial Code, a security interest on after-acquired consumer goods is forbidden unless value is given within ten days after acquisition.[260] The consumer was allowed damages only to the extent of setoff as permitted under the Indiana law since her claim for affirmative relief was barred under the one year statute of limitations.[261] In the other case, an improper disclosure was incorrectly found from the failure of a consumer credit sale to disclose the amount of credit life and disability coverage,[262] and damages were allowed as a setoff

---

[254]Marcovich Land Corp. v. J.J. Newberry Co., 413 N.E.2d 935 (Ind. Ct. App. 1980).

[255]*Cf.* Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53 (W.D. Pa. 1980) (aluminum seller faced with inflation given relief under long term sales contract).

[256]American Fletcher Mortgage Co. v. Cousins Mortgage & Equity Investments, 623 F.2d 1228 (7th Cir. 1980).

[257]State, Ind. Dep't of State Revenue v. Lees, 418 N.E.2d 226 (Ind. Ct. App. 1980). The former statute was Act of March 6, 1931, ch. 175, § 30, 1931 Ind. Acts 192 (amended 1937, 1951) *as amended by* Act of March 12, 1957, ch. 204, § 1, 1957 Ind. Acts 424 (repealed 1976).

[258]IND. CODE § 6-4.1-8-1 (1976) (no limitation on personal liability).

[259]Corbin v. Town Fin., Inc., 417 N.E.2d 1172 (Ind. Ct. App. 1981). Both the federal truth-in-lending law and the Uniform Consumer Credit Code require a description of the security interest and a "clear identification of the property to which the security interest relates." 15 U.S.C. § 1639(a)(8) (1976); IND. CODE § 24-4.5-3-306(2)(k) (1976). Federal Reserve Regulation Z, 12 C.F.R. § 226.8(b)(5) (1981), specifically requires after-acquired property to be "clearly" set forth in conjunction with a description of the type of security interest.

[260]IND. CODE § 26-1-9-204(4)(b) (1976).

[261]*See* Streets v. M.G.I.C. Mortgage Corp., 378 N.E.2d 915 (Ind. Ct. App. 1978), *discussed in* Townsend, *Secured Transactions and Creditors' Rights, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 369, 371-72 (1980).

[262]Means v. Indiana Financial Corp., 416 N.E.2d 896 (Ind. Ct. App. 1981). The case applied IND. CODE § 24-4.5-2-306(2)(g) (1976). However, the case was in error. While the

against an assigneee who did not show that it was a good faith purchaser who had given notice of the assignment as required by the Uniform Consumer Credit Code.[263] *Crestwood Park, Inc. v. Apostal*[264] indicated that officers of a corporation transferring its assets to a trust for the purpose of avoiding corporate debts could be held liable to its creditors.

Several decisions involved the award of attorney's fees where provided for by agreement or statute.[265] While several cases upheld awards of attorney's fees without proof on the theory that the judge below is an expert who may judicially note what is a reasonable fee,[266] the court of appeals has sounded a warning against the practice and held that fees should be carefully established by time records in accordance with the Code of Professional Responsibility—at least where the case is unusual or involved.[267]

Bankers and lenders had a field day in the 1981 legislature. Obligations secured by first mortgages and liens on land were taken out of most of the regulatory provisions of the Uniform Consumer Credit Code except for disclosures, remedies, and powers of the administrator.[268] Thus, there seems to be no limit on interest rates chargeable upon consumer credit sales and loans on real estate

---

cited Indiana Uniform Consumer Credit Code provision requires the amount of insurance to be stated, the Federal Truth in Lending Act does not. Indiana law, however, specifies that if disclosures meet the requirements of the federal law, requirements of Indiana law are met. IND. CODE § 24-4.5-2-301(2) (1976). Hence, both Indiana and federal law disclosure requirements did not require the amount to be stated.

In another decision the court of appeals initially refused to review a truth in lending violation because the security agreement was not included in the record on appeal; however, the court granted a rehearing after finding that the promissory note, which was in the record, contained violations. Noel v. General Fin. Corp., 419 N.E.2d 200 (Ind. Ct. App.), *rehearing granted*, 421 N.E.2d 25 (Ind. Ct. App. 1981).

[263]IND. CODE § 24-4.5-2-404 (1976). The court held that the assignee had notice as shown by the face of the sales agreement.

[264]413 N.E.2d 654 (Ind. Ct. App. 1980). The issue was not decided since the case was reversed on other grounds.

[265]*E.g.*, Donahue v. Watson, 413 N.E.2d 974 (Ind. Ct. App. 1980) (attorney's fee to trustee from trust estate allowed at an hourly rate of $50 to a lawyer with one and one half years of experience and at $60 to one with 25 years of experience—note how experience pays off).

[266]State v. Kuespert, 411 N.E.2d 435 (Ind. Ct. App. 1980) (attorney's fees of $1,381.34 which were awarded as sanction for failure to respond to discovery fixed by judge's judicial knowledge).

[267]U.S. Aircraft Financing, Inc. v. Jankovich, 407 N.E.2d 287 (Ind. Ct. App. 1980) (fees of $30,000 for foreclosing conditional sales contract rejected and sent back for retrial on basis of court's knowledge derived from pleadings, documents, and time lawyer spent in court).

[268]"Mortgage transactions" defined as consumer first mortgages on or consumer credit sales of real estate were taken out of the Code provisions with the exceptions noted above. IND. CODE §§ 24-4.5-1-301(15)(a), -2-104(2)(b), -3-105 (Supp. 1981).

(unless they qualify as consumer related sales or loans). Incredibly, this is the first time in 100 years that the lid on interest rates on home and other mortgages in Indiana has been completely lifted.[269] Other legislation extended interest rates to twenty-one percent on overall consumer credit sales and supervised loans; and to twenty-one percent on consumer related sales and loans.[270] The permissible scope of VRM and ROM loans for banks was expanded to accord with federal tolerances,[271] and banks were permitted to make second mortgages subject to valuation requirements.[272] Interest rates on judgments were raised from eight to twelve percent.[273] This provision becomes effective after December 31, 1982. Budget service agencies were allowed to charge an initial fee, but were required to post a higher bond and forbidden to take accounts unless a budget analysis shows that the debtor can reasonably meet required payments.[274]

---

[269]This is justified by some bankers from the fact that on March 31, 1980, Congress took the lid off interest rates on first mortgage home loans with respect to loans by lenders under the National Housing Act and under laws insuring deposits of banking institutions. States may reinstate maximum limits by vote before April 1, 1983. Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132, 161-63 (to be codified in 12 U.S.C. § 1735f-7).

[270]IND. CODE §§ 24-4.5-2-201(2)(b), -602(2), -3-508(2)(b), -602(2.5) (Supp. 1981).

[271]*Id.* §§ 28-1-13.5-2 to -3.

[272]*Id.* § 28-1-13-7(b).

[273]*Id.* § 24-4.6-1-101.

[274]*Id.* §§ 28-1-29-6, -8, -12.

XVI. Taxation

J. B. KING*

A. *Introduction*

During the past survey period both the Indiana Supreme Court and the Indiana Court of Appeals displayed a pragmatic but statutorily oriented approach to the disposition of state tax cases. Perhaps the best example of this judicial temperament is *Indiana Department of Revenue v. Kimberly-Clark Corp.*[1] in which the supreme court vacated the opinion of the court of appeals[2] and expressly declined to follow a series of decisions from other states which were premised on an artificially literal but, practically speaking, absurd interpretation of Public Law 86-272.[3] In *Kimberly-Clark*, the supreme court clearly evidenced its belief that tax issues are not to be resolved against taxpayers on the basis of hypertechnical interpretations of statutory requirements. In essence, the court has firmly said, contrary to Mr. Bumble's oft-quoted comment in Oliver Twist that "the law is an ass, a idiot,"[4] common sense is still the prevailing yardstick in Indiana for measuring state tax liability.

A second highlight of recent Indiana tax decisions was the courts' renewed emphasis on the legal significance of the tax situs of intangibles in determining liability for both the gross income tax and the intangibles tax. In *Indiana Department of State Revenue v. J.C. Penney Co.*[5] and in *Indiana Department of State Revenue v. Mercantile Mortgage Co.*,[6] the court of appeals recognized that intangibles owned by a nonresident, and administered and controlled at an out-of-state business situs, are not subject to either the gross income tax (*Penney*) or the intangibles tax (*Mercantile Mortgage*) even though the payors (the debtors) on such intangibles were Indiana residents.

This acknowledgment by the Indiana courts of the independent legal significance of the tax situs of intangibles is a refreshing reaffirmation of a traditional state tax concept. The concept of "situs" in taxing intangibles, especially in taxing income from intangibles, has

---

*Member of the Indiana Bar. Member of the firm of Baker & Daniels. A.B., Indiana University, 1951; LL.B., University of Michigan, 1954.

[1]416 N.E.2d 1264 (Ind. 1981).

[2]*Id. See* Weinstein, *Foreword: Indiana Taxation, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 1, 28 (1980).

[3]15 U.S.C. § 381 (1976).

[4]C. DICKENS, OLIVER TWIST, ch. 10, p. 51 (1837-38).

[5]412 N.E.2d 1246 (Ind. Ct. App. 1980).

[6]412 N.E.2d 1252 (Ind. Ct. App. 1980).

been aggressively challenged by a number of vocal proponents of the unitary business concept who argue that intangibles should have no independent significance either as to value or as to place of income when considering the apportionment of business income. The *Penney* and *Mercantile Mortgage* decisions should serve as a clear repudiation of this endeavor to abolish the "situs" concept for intangibles.

One other significant aspect of the past survey period warrants an introductory observation. In *State Board of Tax Commissioners v. Gatling Gun Club, Inc.*,[7] the court of appeals again admonished taxpayers and their lawyers that appeals from property tax assessments by the State Tax Board are not de novo evidentiary proceedings. Therefore, the appealing taxpayer cannot submit to the trial court on appeal new evidence or new witnesses that were not presented to the State Tax Board during its statutory hearing on the contested assessment. In the introduction to last year's Survey,[8] the following admonition was expressed to Indiana's two principal state tax agencies:

> One facet of the recent decisions may be of special concern to the two major state tax agencies, the State Board of Tax Commissioners and the Department of Revenue. The courts have continued to recognize that while these agencies, in holding taxpayer hearings, are not subject to the express requirements of the Indiana Administrative Adjudication Act, they are nonetheless subject to basic administrative law hearing requirements. This recognition may indicate that these agencies should re-evaluate their hearing procedures.[9]

This year's admonition runs to Indiana taxpayers and their counsel who must exercise greater care in their preparation and handling of contested assessments before the State Tax Board if they anticipate seeking judicial review because under the *Gatling Gun Club* decision and its forerunners,[10] the only evidence admissible on appeal is that submitted to the State Tax Board at its administrative hearing.

B. The Supreme Court's Kimberly-Clark *Decision*

Public Law 86-272[11] was enacted by Congress in 1959 to immunize from state taxation the interstate income of taxpayers

---

[7]420 N.E.2d 1324 (Ind. Ct. App. 1981).

[8]King, *Taxation, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 523 (1981) [hereinafter cited as King, *1980 Survey*].

[9]*Id.* at 523 (citation omitted).

[10]*See* Uhlir v. Ritz, 255 Ind. 342, 264 N.E.2d 312 (1970) and State Bd. of Tax Comm'rs v. Stone City Plaza, Inc., 161 Ind. App. 627, 317 N.E.2d 182 (1974).

[11]15 U.S.C. § 381 (1976).

whose only activity in a taxing state was the "solicitation" of sales. As a result, several state court decisions adopted a very narrow interpretation of the kinds of activities that were congressionally protected "solicitation." For example, in *Herff Jones Co. v. State Tax Commission*,[12] *Briggs & Stratton Corp. v. Commission*,[13] *Hervey v. AMF Beaird, Inc.*,[14] and *Miles Laboratories, Inc. v. Department of Revenue*,[15] the courts concluded that if, in conducting an interstate business, a taxpayer's activities in a taxing state amounted to something more than "mere solicitation of sales," then the taxpayer was not protected by Public Law 86-272 and could be taxed by states where he had engaged in such unprotected extra activities. The jurisdictional test developed by such decisions was soon popularly labeled the "solicitation plus" test and has been the subject of many redundant state tax articles generally espousing the correctness of the rule.[16] The Indiana Supreme Court now joins a small but growing number of state courts which are rejecting the "solicitation plus" test.

In *Kimberly-Clark*, the taxpayer employed at least sixteen salesmen, some of whom lived in Indiana, to represent Kimberly-Clark in Indiana. Each salesman was furnished an automobile by Kimberly-Clark along with such usual salesman's materials as brochures, samples of new products, order forms and sometimes portable typewriters, staple guns, and selling cases. In addition to taking orders from Indiana customers, the Kimberly-Clark salesmen would check customer inventories, check shelf facings, aid retailers in pricing their Kimberly-Clark products, and would even set up displays and put products on shelves in retail stores.

The Indiana Revenue Department contended before the court of appeals and again before the supreme court that these latter activities of the Kimberly-Clark salesmen in Indiana had amounted to something more than mere solicitation and that under the "solicitation plus" jurisdictional test Kimberly-Clark was not protected by Public Law 86-272 and was therefore subject to the Indiana adjusted gross income tax. That contention was accepted by the court of appeals which announced in its 1978 reversal of the trial court's decision for Kimberly-Clark that it would follow those decisions from

---

[12]247 Or. 404, 412, 430 P.2d 998, 1002 (1967).

[13]3 Or. T. R. 174 (1968).

[14]250 Ark. 147, 155-56, 464 S.W.2d 557, 561-62 (1971).

[15]274 Or. 395, 400, 546 P.2d 1081, 1083 (1976).

[16]While there are numerous law review and tax journal articles, notes, and commentaries on this subject, some of the more notable of which are: Note, *Public Law 86-272: Legislative Ambiguities and Judicial Difficulties*, 27 VAND. L. REV. 313 (1974); Hartman, *"Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course*, 29 VAND. L. REV. 353 (1976); Note, *State Taxation of Interstate Commerce: Public Law 86-272*, 46 VA. L. REV. 297 (1960); Peters, *State Income Tax Problems of Interstate Business*, 33RD N.Y. INST. ON FED. TAX. 899, 901-15 (1975).

other states that had conceived and perpetuated the "solicitation plus" test.[17]

Shortly after its 1978 *Kimberly-Clark* decision, the court of appeals, in *Indiana Department of State Revenue v. Continental Steel Corp.*,[18] once more followed the "solicitation plus" test. This result was reviewed in last year's Survey as follows:

> The second observation [to the court of appeals' decision in *Continental Steel*] is actually a belated protest to the tide of decisions being handed down throughout the country applying the "solicitation plus" test in determining the applicability of Public Law 86-272. It is not possible within this survey to elucidate a total rebuttal to the unfortunate development of this case law. However, it is this writer's observation that the "solicitation plus" test is a wholly artificial and unrealistic concept. It is difficult to believe that Congress intended to restrict the protections of federal law to corporations whose salesmen engaged only in mere solicitation. Surely Congress understood that the ordinary and habitual practice of salesmen in 1959, and for many years prior thereto, included such routine selling functions as listening to customers' complaints, looking at customers' inventories, accepting customer payments from time to time, and rendering technical assistance to a customer's personnel. The strict "solicitation plus" test naively restricts the activities of a salesman to a sterile, unnatural environment never intended by the Congress. Nevertheless, *Continental Steel* is consistent with the majority of state court decisions now available on this point.[19]

The supreme court's final rejection in *Kimberly-Clark* of this artificial "solicitation plus" test is indeed a welcome result, not because it vindicates last year's comments, but because it reflects a sensible pragmatism by the court in the construction and application of Indiana tax laws. Teachers, lawyers, administrators, and consultants who deal with taxation issues—and sometimes even the courts—are guilty of predicating tax liability on sterile interpretations of the language in a taxing statute, without considering the problems to which the particular tax law was addressed. The supreme court is to be applauded for its common sense recognition in *Kimberly-Clark* that Congress' 1959 enactment of Public Law 86-272 was surely intended to protect activities that are "inex-

---

[17]Indiana Dept. of Revenue v. Kimberly-Clark Corp., 375 N.E.2d 1146 (Ind. Ct. App. 1978), *vacated*, 416 N.E.2d 1254 (Ind. 1981).

[18]399 N.E.2d 754 (Ind. Ct. App. 1980).

[19]King, *1980 Survey*, *supra* note 8, at 539.

tricably related to solicitation"[20] as well as the narrow act of soliciting itself.

C. Calcar v. Cave Stone—*A Continuing Sales Tax Dilemma*

At the time of writing this article, no action has yet been taken by the Indiana Court of Appeals to clarify the contradiction between that court's 1980 opinion in *Indiana Department of State Revenue v. Cave Stone, Inc.*[21] and its earlier decision in *State Department of Revenue v. Calcar Quarries, Inc.*[22] This contradiction could have a significant bearing on the future interpretation and application of the sales tax exemption for manufacturing machinery and equipment.[23]

As observed in last year's survey[24] the court of appeals in its 1979 *Calcar Quarries* decision had recognized that machinery and equipment used by the taxpayer in one continuous flow of production from the taxpayer's quarry operations to its concrete and asphalt manufacturing operations qualified for the statutory sales tax exemption as being "directly used in direct . . . production."[25] Thus the court in *Calcar* rejected the Revenue Department's standard contention that only machinery and equipment which had a *direct causal or positive effect* on the manufactured product could qualify for sales and use tax exemption under the statutory exemption for manufacturing machinery, tools, and equipment.[26] *Calcar Quarries* was quickly viewed by many as representing the first step toward a more practical and common sense construction by the Revenue Department of the manufacturing exemption.

The prospect of *Calcar Quarries* as a significant precedent was, however, soon clouded by the 1980 decision in *Cave Stone* in which the court of appeals sustained the Revenue Department's assessment of sales and use tax on equipment used to transport crude stone from a quarry to a stone crusher and then from the crusher to stock piles.

The court appears to have fundamentally accepted the Revenue Department's contention that, to be exempt, production machinery must have a direct causal effect on the product being manufactured. Unfortunately, it is not clear whether in *Cave Stone* the court was

---

[20]United States Tobacco Co. v. Commonwealth, 478 Pa. 125, 386 A.2d 471, *cert. denied*, 439 U.S. 880 (1978).

[21]409 N.E.2d 690 (Ind. Ct. App. 1980).

[22]394 N.E.2d 939 (Ind. Ct. App. 1979).

[23]*See* IND. CODE §§ 6-2.5-5-3, -4 (Supp. 1981) (previously codified at IND. CODE § 6-2-1-39(b)(6) (1976)).

[24]King, *1980 Survey*, *supra* note 8, at 536-37.

[25]*See* note 23 *supra* and accompanying text.

[26]*Id.*

really embracing the Revenue Department's direct use test and requiring that the machinery have a "positive effect" on the manufactured product or whether the court was simply concluding that the taxpayer was engaged in two separate exempt functions, quarrying and manufacturing. In the latter instance, transportation equipment which merely moved the stone from the quarry to the manufacturing operation was taxable because such equipment was not directly integral to either exempt function.

In both *Calcar Quarries* and *Cave Stone*, the Revenue Department had presented the supreme court's decision in *Indiana Department of State Revenue v. RCA Corp.*[27] as its authority for the contention that exempt machinery, tools, and equipment must have a direct "positive effect" on the manufactured product. This interpretation of *RCA*, which was apparently rejected in *Calcar* and possibly accepted in *Cave Stone*, goes far beyond the actual holding in *RCA* where the court was solely concerned with just two kinds of environmental control equipment. It is true that the supreme court in *RCA* was perplexed by the so-called "double direct" language in the statutory exemption for manufacturing equipment.[28] Nevertheless, it is not credible that the court in *RCA* intended to emasculate the manufacturing exemption by requiring that production machinery actually touch the product to be exempt.

In considering the daily manufacturing operations of a typical plant or factory, obviously there are many kinds of production machinery and equipment which would not, individually or separately, have a "direct positive effect" upon the manufactured product. For example, an electric motor which, as a component, drives a lathe on a continuous production line does not itself touch the manufactured product; but to say, therefore, that the motor is not directly used in direct production and therefore not exempt, and to concurrently ascribe to the General Assembly an intention to exempt the lathe is the very kind of absurdity which the supreme court in *Kimberly-Clark*[29] declined to endorse. In short, as in the case of the interpretation of Public Law 86-272 and the use of the term "solicitation" in that law,[30] the scope of this sales tax exemption cannot be determined on the basis of some sterile or clinical interpretation of words that makes a mockery of the law itself.

Perhaps by the time this Article is published, the court of appeals will have resolved the contradiction created by its decisions in

---

[27]Indiana Dept. of State Revenue v. RCA Corp., 160 Ind. App. 55, 310 N.E.2d 96 (1974).

[28]IND. CODE § 6-2-1-39(b)(6) (1971) (currently codified at IND. CODE § 6-2.5-5-3 (Supp. 1981)).

[29]416 N.E.2d 1264 (Ind. 1981) (vacating 375 N.E.2d 1146 (Ind. Ct. App. 1978)).

[30]15 U.S.C. § 381 (1976).

Cave Stone and *Calcar*. If the court of appeals fails to do so, it is hoped that the supreme court will reexamine its *RCA* decision and clarify its intended scope as well as reconcile the apparent differences which now exist among *Calcar*, *Cave Stone*, and also the court of appeals decision in *Indiana Department of State Revenue v. American Dairy of Evansville*.[31] A welcome alternative would be for the Revenue Department itself to adopt a more realistic interpretation of the sales tax exemption.[32]

D. The 1980-1981 Gross Income Tax Decisions

Indiana Department of State Revenue v. J.C. Penney Co.[33] was clearly the leading decision concerning gross income tax during this survey period. In that decision the court of appeals held that Penney's gross receipts from direct mail catalog sales to Indiana customers and from credit service charges attributable to revolving credit accounts with Indiana customers were not subject to the Indiana gross income tax.

In holding that Penney was not liable for gross income tax on its proceeds from direct mail catalog sales to Indiana customers, the court observed that Penney had in fact reported and paid gross income tax on its catalog sales from orders placed by Indiana customers at local catalog desks in the Penney stores. As to the direct mail order sales which the Revenue Department had taxed, the court observed that these orders were mailed by Penney's Indiana customers directly to Penney's catalog center in Wisconsin where the orders were accepted, and shipment was made from the Wisconsin catalog center directly to the Indiana customers.

The court expressly acknowledged that Penney, in conducting its mail order business, had engaged in some related activities in Indiana; for example, approximately twenty percent of Penney's catalogs had been made available to Indiana customers for a limited period of time at the local Indiana Penney stores, and on rare occasions a dissatisfied mail order customer would arrange for an adjustment or repair of his mail order purchase at an Indiana retail store. In discussing these activities, which were related to the direct mail

---

[31]Indiana Dept. of State Revenue v. American Dairy of Evansville, Inc., 167 Ind. App. 367, 338 N.E.2d 698 (1975).

[32]It should be noted that in 1967 the Indiana Revenue Department adopted a very broad interpretation of the manfacturing exemption. That interpretation was stated in the Department's Sales Tax Circular No. 16, dated January 1, 1967. However, without any public hearings, that circular was later revised by the Department, effective July 1, 1969, to sharply curtail the Department's broader 1967 interpretation. Nevertheless, the Department, by it own actions, has itself in the past demonstrated that it believes it has a substantial measure of discretion in administering this exemption.

[33]412 N.E.2d 1246 (Ind. Ct. App. 1980).

sales, the court specifically acknowledged the supreme court's ruling in *Department of Treasury v. Allied Mills, Inc.*[34]

This acknowledgement of *Allied Mills* is extremely important because it finally put to rest the Indiana Revenue Department's contention that an out-of-state taxpayer is subject to gross income tax on sales delivered from an out-of-state source to an Indiana customer when that taxpayer has a like inventory or like selling activity in Indiana. In short, the court in *Penney*, while recognizing that the taxpayer had catalog desks in its local retail stores where catalog sales could be placed, nevertheless concluded that as to those catalog sales which were made by direct mail orders, no gross income tax liability could be imposed.

The *Penney* decision is also significant because of the court's emphasis on the Indiana Supreme Court's 1943 decision in *Department of Treasury v. International Harvester Co.*[35] There the court had ruled that International Harvester was not subject to gross income tax in respect to sales made by an out-of-state branch office to Indiana customers because the Gross Income Tax Act itself[36] did not impose a tax on the receipts of a nonresident from businesses conducted at an out-of-state business situs. In *Penney*, the court emphasized the *International Harvester* holding that Harvester's out-of-state branch office income was not "derived from sources within the state of Indiana"[37] and was, therefore, statutorily not taxable.[38]

The *Penney* court's recognition of the limited application of *Allied Mills* and its reapproval of the *International Harvester* holding should eliminate some of the confusion regarding the scope of taxation under the Indiana Gross Income Tax law. The *Penney* decision, by recognizing *Allied Mills* and *International Harvester*, as well as the *Gross Income Tax Division v. Owens-Corning Fiberglass Corp.*[39] and *Mueller Brass Co. v. Gross Income Tax Division*[40] decisions, has correctly enunciated that the gross income tax is a tax on *transactions*. Consequently, the Revenue Department and the courts must look to the taxpayer's activities in Indiana which are, in fact, directly related to the particular transactions the state seeks to tax. Only by doing this can it be determined whether those transactions are actually within the purview of the taxing statute. As the Indiana Supreme Court recognized in the *International Harvester* decision,

---

[34]220 Ind. 340, 42 N.E.2d 34 (1942), *aff'd per curiam*, 318 U.S. 740 (1943).

[35]221 Ind. 416, 47 N.E.2d 150 (1943), *aff'd on other grounds*, 322 U.S. 340 (1944).

[36]IND. CODE § 6-2-1-2 (1976).

[37]412 N.E.2d at 1249 (quoting 221 Ind. at 422, 47 N.E.2d at 152).

[38]IND. CODE § 6-2-1-2 (1976).

[39]253 Ind. 102, 251 N.E.2d 818 (1969).

[40]255 Ind. 514, 265 N.E.2d 704 (1971), *dismissed for want of federal question*, 403 U.S. 901 (1971).

the issue is often not a constitutional question of due process or of the commerce clause, but rather whether the statute itself imposes a tax liability.

Consistent with its holding on the first issue, the court in *Penney* held that Penney's income from revolving credit accounts administered and maintained at an out-of-state regional credit office was not subject to the gross income tax. The court said: "The dispositive issue becomes whether Penney's service charge income, which was income earned on intangibles, was derived from activities, business, or sources within the state."[41] Citing its earlier decision in *Indiana Department of State Revenue v. Convenient Industries of America, Inc.*,[42] the court concluded that J.C. Penney's activities in Indiana with respect to the revolving credit accounts were "remote and minimal" and that accordingly "Penney's activities [were] not taxable *given the wording of* [*the Indiana*] *statute* . . . ."[43] In so holding, the court emphasized that its decision was based on the wording of the Indiana statute and that therefore it was not necessary for the court to reach the issue of whether the imposition of the tax would be unconstitutional.

Three other recent decisions in the area of gross income tax are worthy of mention. In *Indiana Department of State Revenue v. Marsh Supermarkets, Inc.*,[44] the court of appeals held that cash discounts extended by Marsh to its retail customers through the use of discount coupons in newspapers were not subject to the Indiana sales tax. The court also held that Marsh was not liable for Indiana gross income tax on cash discounts received by it from its vendor suppliers in connection with the issuance of the customer discount coupons. Likewise, the court also held that Marsh was not subject to gross income tax on reimbursements received by it pursuant to written agency agreements under which two wholly-owned subsidiary corporations had agreed to reimburse Marsh for various administrative costs Marsh incurred as agent for and on behalf of such subsidiaries.

In sustaining the trial court's judgment for Marsh, the court observed that "[e]ssentially the Department's quarrel with the trial court's judgment is that the Department disagrees with that judgment without recognizing that there is substantial evidence to support it."[45] In rejecting this "quarrel," the court once again acknowledged that a reviewing court shall not set aside the findings

---

[41]412 N.E.2d at 1251.

[42]157 Ind. App. 179, 299 N.E.2d 641 (1973).

[43]412 N.E.2d at 1252 (emphasis added).

[44]412 N.E.2d 261 (Ind. Ct. App. 1980).

[45]*Id.* at 266.

or judgment of a trial court unless clearly erroneous, and neither will it reweigh the evidence nor judge the credibility of the witnesses.

With respect to the Revenue Department's attack on the agency agreements between Marsh and its subsidiaries, the court noted that the real issue was whether an agency relationship could exist in view of the fact that the reimbursements were based on percentage formulas. In answer to the Department's contention, the court said:

> *Ice Service, Inc., supra,* is dispositive. Our Supreme Court there decided that use of a percentage allocation did not necessarily make such receipts taxable under the Act. *Ice Service* recognized that a strict item by item reimbursement was not an indispensable characteristic of an agency relationship, but that the parties could agree as to allocated amounts, i.e., the use of percentage factors. Additionally, *Ice Service* found that the expense of a precise accounting system justifies a reasonable, estimated alternative.[46]

In *Indiana Department of State Revenue v. Commercial Towel & Uniform Service, Inc.*,[47] the court of appeals was confronted with whether the income of several taxpayers had been received from the business of dry cleaning and laundering within the meaning of Indiana Code section 6-2-1-3(d)[48] and therefore was properly taxable at the rate of one-half of one percent. The Department had contended that the taxpayers did not qualify for this lower gross income tax rate because they "did not have the requisite assets and operations to be classified in the business of laundering and dry cleaning."[49] According to the court's opinion, the taxpayers did not own or lease any laundering or dry cleaning equipment, but instead contracted with other separate corporations for the necessary laundering services. The taxpayers then furnished to their customers the clean linens, towels, and uniforms that were laundered or dry cleaned by the subcontractors.

In ruling that the taxpayers were in fact engaged in a rental service and did not themselves perform a laundering and dry cleaning business activity, the court observed that the controlling factor as to which gross income tax rate should be applied is not the "character of Taxpayer's business, but the source of the income" and that based on the uncontested facts before the court, "the rental service [was] the source of the income."[50]

---

[46] *Id.* at 268.

[47] 409 N.E.2d 1121 (Ind. Ct. App. 1980).

[48] IND. CODE § 6-2-1-3(d) (1976).

[49] 409 N.E.2d at 1123.

[50] *Id.*

Indiana Department of State Revenue v. Lyall Electric, Inc.[51] is still another example of the courts' 1980-1981 pragmatic approach to the determination of state tax issues. In *Lyall Electric*, the Revenue Department sought to impose the gross income tax on income Lyall Electric had received for rendering services to affiliated corporations. The sister corporations had joined with Lyall Electric in the filing of a consolidated gross income tax return.

The Revenue Department argued that during the disputed tax years, the income from services rendered between affiliated corporations was taxable because the statutory consolidated return provision then in effect excluded only interaffiliate income derived from intercompany sales of property, rentals, interest, and dividends.[52] The consolidated return provision, however, was amended after the assessment years at issue to provide that all income between consolidating corporations is excludable.

The court of appeals recognized the argument that this amendment necessarily implied that income from services had not previously been excludable. The court concluded that the better view was that the amendment was enacted only to more clearly express the legislature's original intent. After observing that in the case of intercompany income between affiliated corporations the payor and the recipient are together one taxable entity, the court then considered whether there was any justification for holding that some kinds of intercompany receipts are taxable and other kinds not taxable. On this point the court concluded: "The question then arises whether there is a reason to treat certain receipts as income and to eliminate others from income merely because the acts generating the receipts differ. *The state offers no reason, nor is one apparent from reading the statute.*"[53]

E. The Tax Situs Of Intangibles—Mercantile Mortgage

The court of appeals' decision in *Indiana Department of State Revenue v. Mercantile Mortgage Co.*[54] restores one's faith that the American system of jurisprudence is still fundamentally founded on the doctrine of *stare decisis*. Old cases are not, by age alone, bad law. The court in *Mercantile Mortgage* quite properly reaffirmed this position when it stated:

> It has long been recognized that the situs of intangibles follows the residence of the owner *unless* the property

---

[51]411 N.E.2d 685 (Ind. Ct. App. 1980).

[52]IND. CODE § 6-2-1-14 (1976).

[53]411 N.E.2d at 687 (emphasis added).

[54]412 N.E.2d 1252 (Ind. Ct. App. 1980).

somehow acquires a permanent situs elsewhere. *Miami Coal Co. v. Fox* (1931) 203 Ind. 99, 176 N.E. 11; *Senour v. Ruth* (1895) 140 Ind. 318, 39 N.E. 946; *Powell v. City of Madison* (1863) 21 Ind. 335. One method whereby property can acquire its own separate permanent situs is where the property is controlled and placed with some degree of permanency in another state. *Standard Oil Co. v. Combs* (1884) 96 Ind. 179; *Foresman v. Byrns* (1879) 68 Ind. 247; *Herron v. Keeran* (1877) 59 Ind. 472; *Theobald v. Clapp* (1909) 43 Ind. App. 191, 87 N.E. 100.[55]

As noted in the introduction,[56] there has been in recent years a continuous clamor by some state tax authorities to abolish the situs concept as it has been traditionally recognized and applied in the taxation of intangibles. *Mercantile Mortgage* is a delighful respite from that clamor.

Mercantile Mortgage could become one of the most significant decisions of the last decade concerning taxation of intangibles because it stands for this proposition: A nonresident owner of intangibles does not incur an Indiana intangibles tax liability on intangibles administered and controlled at an out-of-state location *even though there are some minimal Indiana activities or contacts connected with the execution, issuance and delivery of the intangibles in Indiana.*

To some scholars and practitioners, *Mercantile Mortgage* may appear as a step back from the State's intended imposition of this tax. But this really is not the case. Over the last several years, there has been a gradual *administrative expansion* of the original scope of the intangibles tax law, and the court has simply made it clear to the Revenue Department that this tax law is to be administered within its original purview, which requires a proper recognition of the situs concept.

Undoubtedly, there will be those who will debate this interpretation of the intended purview of the 1933 intangibles tax law, but it should be remembered that this law was expressly intended to be "in lieu of all other taxes except estate and/or inheritance and gross income taxes."[57] Thus, the original design of the tax was to relieve owners of intangibles from the much harsher Indiana property taxes. The 1933 General Assembly was not concerned with intangibles having only a transitory presence in Indiana. Therefore, the court of appeals in its 1980 *Mercantile Mortgage* decision very properly, and quite laudably, recognized that Mercantile's transitory in-

---

[55]*Id.* at 1254-55.

[56]*See* text accompanying notes 2-3 *supra.*

[57]Act of Feb. 28, 1933, ch. 81, § 31, 1933 Ind. Acts 537 (1933).

tangibles, while executed and delivered in Indiana, were not subject to the intangibles tax.

F. Judicial Review of State Tax Board Assessments— Uhlir v. Ritz *Revisited*

The administrative proceedings of the State Tax Board, including its hearings on contested assessments, are specifically excluded from the requirements of the Administrative Adjudication Act.[58] Nevertheless, in *State Board of Tax Commissioners v. Gatling Gun Club, Inc.*[59] the court of appeals applied the supreme court's 1970 ruling in *Uhlir v. Ritz*[60] to an appeal from the State Tax Board's assessment and acknowledged the limitations of the reviewing court:

> Thus, even where the Administrative Adjudication Act is inapplicable and another statute expressly provides for an appeal de novo, the reviewing court must go no further than to examine the propriety of the agency's facts as the agency found them and the propriety of the agency's order in light of the facts found. The reviewing court may not simply review and reweigh the evidence without giving weight to the agency's findings. *Uhlir v. Ritz, supra.*[61]

The court in *Gatling Gun Club* held that the trial court had committed reversible error by admitting into evidence testimony and exhibits not introduced at the State Tax Board's administrative hearing, and further stated:

> We conclude that, aside from the hearing officer, who may testify regarding his investigation and his recommendation to the board, only those witnesses who testified at the board's hearing may testify at the judicial review hearing, and they may testify only to those facts to which they testified at the board's hearing. Similarly, only those exhibits introduced at the board's hearing may be introduced on judicial review. *See State Board of Tax Commissioners v. Stone City Plaza, supra.*[62]

One curious aspect of the *Gatling Gun Club* decision is that the court, in a footnote, recognized its 1979 decision in *Stokely-Van Camp, Inc. v. State Board of Tax Commissioners*[63] as follows:

---

[58]IND. CODE § 4-22-1-2 (1976).
[59]420 N.E.2d 1324 (Ind. Ct. App. 1981).
[60]255 Ind. 342, 264 N.E.2d 312 (1970).
[61]420 N.E.2d at 1328.
[62]*Id.*
[63]394 N.E.2d 209 (Ind. Ct. App. 1979).

> Although the club did not raise the issue either before the circuit court or on appeal to this court, it does not appear from the record that the board issued written findings of fact. The notice given by the board of its action on the club's application for exemption merely stated that the exemption was denied for the property in question. The hearing officer's one-page report and recommendation to the board is too brief and conclusory to constitute findings of fact. Although findings of fact are not statutorily required for proceedings before the board, this court has held that written findings are necessary in order for the circuit or superior court to review the board's action. *Stokely-Van Camp, Inc. v. State Bd. of Tax Comm'rs*, (1979) Ind.App., 394 N.E.2d 209.[64]

The *Gatling Gun Club* case was remanded to the trial court for a new hearing consistent with the decision of the court of appeals. It is unclear, however, whether the taxpayer could now raise for the first time the procedural defect in the State Tax Board's order, which did not include written findings of fact as required by the *Stokely-Van Camp* ruling. Once again the court is admonishing the State Tax Board, as well as taxpayers, of the requirements of due process even though the Board is statutorily exempt from the administrative hearing requirements of the Administrative Adjudication Act.

G. *Some Inheritance Tax Decisions*

The past survey period was sprinkled with several inheritance tax decisions. Most of these cases involved single issue rulings which do not represent significant developments in the law. Practitioners in this field are, of course, obliged to double check all of these rulings.

The holdings by the court of appeals in *In re Estate of Newell*[65] and *In re Estate of Wisely*[66] are interesting to compare because each dealt with the issue of whether a beneficiary's renunciation of a testamentary transfer of property affected the computation of inheritance tax. In *Newell*, the court applied the pre-1975 law and ruled that the beneficiary's renunciation would have no effect upon the assessment of inheritance tax.[67] In *Wisely*, however, the court con-

---

[64] 420 N.E.2d at 1329 n.5.
[65] 408 N.E.2d 552 (Ind. Ct. App. 1980).
[66] 402 N.E.2d 14 (Ind. Ct. App. 1980).
[67] IND. CODE § 29-1-6-4 (1971).

strued the amended version of Indiana Code section 29-1-6-4(c)[68] and concluded that the amendment made it clear that renunciation of a testamentary interest relates back to the date of the decedent's death *for all purposes*. Consequently, the inheritance tax is to be assessed as if there were no taxable transfer to the renouncing beneficiary.

In *In re Estate of Compton*,[69] the court of appeals considered whether the filing of a petition for redetermination by the Revenue Department would reopen the estate's right to petition the Department for a refund even though the three year statute of limitations for requesting refunds had elapsed. The court, relying on the well-settled principle that special statutory procedures must be strictly followed, ruled that the estate's right to petition for a refund terminated upon the expiration of the three year period and that the Revenue Department's filing of the petition for redetermination did not confer upon the estate the correlative right to reopen refund claim issues.[70]

H. 1981 Tax Legislation

The 1981 General Assembly produced the usual quantity of new tax laws and amendments to existing laws. Some of the more significant include:

1. Recodification of the Indiana Gross Income Tax.—Public Law 77[71] amends Title 6 of the Indiana Code to add a new Article 2.1 which codifies the Indiana Gross Income Tax Law and repeals inconsistent provisions of the prior law. The drafters of this Gross Income Tax Code have done a commendable job as this recodification was certainly no simple task. However, as gross income tax questions arise, some of the codified provisions may appear to have effected substantive changes in the law. It must be kept in mind that the Code itself was not intended to change the substantive law as it existed immediately prior to the recodification. Therefore, when interpreting the new Code, it will be necessary for careful practitioners and the courts to look to the old law for controlling guidance as to the proper interpretation of the Code's new language.

2. Elimination of Interest Charges on Assessment Errors Caused by Assessment Officials.—Public Law 76[72] amends Indiana Code section 6.1.1.-37 to provide that a taxpayer shall not be subject to interest charges on property tax payments that are increased because of in-

---

[68]IND. CODE § 29-1-6-4(c) (1976).

[69]406 N.E.2d 365 (Ind. Ct. App. 1980).

[70]*Id.* at 372.

[71]Acts of April 29, 1981, Pub. L. No. 77, 1981 Ind. Acts 914 (1981).

[72]Acts of March 27, 1981, Pub. L. No. 76, 1981 Ind. Acts 913 (1981).

creases in assessment, if the increased assessment was caused by the error or neglect of a taxing official.

3. Interstate Commerce Exemption for Goods Stored in a Public Warehouse.—Public Law 63[73] amends, *inter alia*, Indiana Code section 6-1.1-10-30 by expanding the personal property tax exemption for goods held in a public warehouse to include goods shipped to that warehouse by common, contract, or private carrier. The prior exemption was limited to goods moved by common carrier. The 1981 amendment also provides that goods stored in a public warehouse may not be exempted if the owner of such goods owns or leases the public warehouse. This amendment broadens the definition of "nonresident," for purposes of the Interstate Commerce exemption, to include any taxpayer who places goods in the original package into the stream of commerce from a location outside of Indiana but with an Indiana destination. This of course means that an Indiana resident could be deemed to be a "nonresident." The effective date of Public Law 63 is January 1, 1982.

4. Property Tax Credits for New Manufacturing Equipment Located in "Economically Disadvantaged Areas."—Public Law 72[74] amends Indiana Code sections 6-1.1-12.1 and 6-3-3.1 to provide a personal property tax deduction to a purchaser of new manufacturing equipment to be located in an "economically disadvantaged area." The permitted deduction for such new equipment ranges from 100% of assessed value of the equipment for the first taxable year to a termination of the deduction upon the sixth year, with a declining sliding scale for the intervening years. Applications for the new deduction must be filed between March 1 and May 10 of the year the new equipment is installed. The Act is effective for deduction applications filed after December 31, 1981.

5. Inheritance Tax Amendments.—Public Law 89[75] amends Indiana Code section 6-4.1-3 to increase from $5,000 to $10,000 the inheritance tax exemption for property that a decedent transfers to the decedent's child, if the child is under twenty-one years of age. Public Law 90[76] amends Indiana Code section 6-4.1-3 to increase the inheritance tax exemption from $2,000 to $5,000 for transfers to one of the decedent's parents. Public Law 91 amends Indiana Code section 6-4.1-8-4[77] so that a consent to transfer is no longer required in order to transfer funds to the surviving joint owner of a decedent's joint checking account. Notice of the transfer, however, must be furnished to the Revenue Department or to the County Assessor.

---

[73]Acts of May 5, 1981, Pub. L. No. 63, § 4, 1981 Ind. Acts 837 (1981).
[74]Acts of April 28, 1981, Pub. L. No. 72, 1981 Ind. Acts 885 (1981).
[75]Acts of April 27, 1981, Pub. L. No. 89, 1981 Ind. Acts 1015 (1981).
[76]Acts of April 27, 1981, Pub. L. No. 90, 1981 Ind. Acts 1017 (1981).
[77]Acts of April 7, 1981, Pub. L. No. 91, § 1, 1981 Ind. Acts 1018 (1981).

XVII. Torts

DANIEL J. HARRIGAN*

A. *Introduction*

Indiana court decisions during the survey period have significantly altered the law of torts. Important rulings were handed down which interpreted the recently enacted Tort Claims and the Medical Malpractice Acts. Several constitutional challenges were made against the Medical Malpractice Act. Our courts of review have honored legislative discretion and upheld the validity of the Act. The Tort Claims Act was given a generally restrictive interpretation, and the 180 day notice requirement in particular was construed in a way sharply limiting claimants' rights.

There were also important developments in tort law as it affects landlords and tenants, landowners and third parties, employers and employees, keepers of animals, construction contractors, and real estate vendors. Attorneys, loan officers,[1] corporation directors, school officials, and public servants were affected by landmark decisions.

Instances in which punitive damages were allowable were discussed, and the old restrictions on child death and wrongful death damages were reaffirmed.

In short, the torts field continued to grow and develop at a brisk pace. It was a dynamic and stimulating year.

B. *Medical Malpractice*

In *Johnson v. St. Vincent Hospital, Inc.*,[2] the Indiana Supreme Court addressed the issue of the constitutionality of the Medical Malpractice Act. The court found that the various constitutional attacks made upon the statute were without merit. The challenges were focused in six different areas.

It was alleged that the concept of a medical review panel as a predicate to the initiation of a civil suit and the admissibility of the

---

*Daniel J. Harrigan, born Indianapolis, Indiana, October 30, 1937; admitted to bar, 1963, Indiana. Preparatory education, Indiana University (B.S., 1959); legal education, Indiana University (J.D., 1962). Fraternity: Phi Alpha Delta. Note Editor, Indiana Law Journal, 1962. Law Clerk to Judge Dewey Kelley, Indiana Appellate Court, 1963. Member: Howard County and Indiana State Bar Associations; Indiana Trial Lawyers Association (Director, 1977—; Treasurer, 1978—); The Association of Trial Lawyers of America (State Committeeman).

[1]See Townsend, *Secured Transactions and Creditors' Rights, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 367, 383 (1981).

[2]404 N.E.2d 585 (Ind. 1980).

panel's opinion violated the patient's right to jury trial, equal protection of the law, due process of law, and the doctrine of separation of powers between the three branches of government. The court responded that the delay and expense in getting to a jury trial are justified because there would be expense and delay in preparing the claim in any case, and participation in the review process "will satisfy to a great extent their preparation needs,"[3] thus reducing the time spent in trial preparation once litigation is commenced and reducing the cost of securing expert testimony. The court expressed great confidence that any bias or prejudice in the preparation of the panel opinion could be effectively coped with by "articulate and imaginative advocacy."[4] The court also opined "that the jury drawing upon its collective experience and good sense, and under the oath to well and truly try the cause, will be fully capable of according the panel opinion could be effectively coped with by "articulate and imaginative advocacy."[4] The court also opined "that the jury drawing and impermissible restriction on the right to trial by jury.[6]

The delay and expense attributable to the panel submission requirement does not deny patients due process and due course of law and access to the courts guaranteed by Article 1, section 12 of the Indiana Constitution[7] and by the fourteenth amendment to the Constitution of the United States of America.[8] The legislature has the power to alter the manner of gaining a remedy in court. The legislature perceived a menace to health care caused by the high cost and unavailability of liability insurance. "The dominant aim of the Act as a whole is to preserve health care services for the community."[9] The court reasoned that any delay occasioned by the panel procedure would have the offsetting virtue of encouraging the settlement of claims and discouraging speculative lawsuits.[10] The court rejected the argument that the delay in filing suit could result in the death or disappearance of the health care defendant before suit could be instituted. The court reasoned that the health care provider would be a permanent fixture in the community and would have actively participated in the panel proceedings.[11] The court also pointed out that the law has always encouraged investigation and settlement attempts before suit.[12]

---

[3]*Id.* at 592.
[4]*Id.* at 593.
[5]*Id.*
[6]*Id.*
[7]*Id.* at 594.
[8]*Id.*
[9]*Id.* at 595.
[10]*Id.*
[11]*Id.*
[12]*Id.*

The court rejected the argument that a lack of detailed statutory provisions respecting the panel's organization and procedure rendered the Act void for vagueness. The court reasoned that the statute contemplates that the "panel will function in an informal and reasonable manner."[13] Since the panel's function is limited to the rendering of an expert opinion and since it functions under the tutelage of a lawyer, the absence of specific procedural provisions is reasonable.[14]

Rejected also was the notion that compensation to the panel members is so slight that they would do less than an adequate job. The court reasoned that the panel members would view their service as a public duty and give due regard to the public and private interests being served.[15]

The court also rejected the argument that the Act constituted impermissible special class legislation. The court determined that medical malpractice cases by reason of their potential number and size pose a special economic threat to the rewards which health care providers may enjoy in return for their services. The panel requirement serves the purpose of establishing the technical facts in a given case and tends to ensure that a resolution of the dispute will be factually well-grounded and will be fair. Hence, the court concluded that to the extent it imposes burdens on patients and benefits on health care providers, it does so consistent with the Constitution.[16]

The appellants also contended that the requirement of the Act that the panel opinion be admitted into evidence usurps the judicial authority of the courts. The court rejected this argument, saying that the opinion of medical experts has always been sanctioned by the courts.[17]

The appellants challenged the $500,000.00 limitation imposed by the Act upon a malpractice recovery. The court approved the cap because although arbitrary, it is a valid exercise of the state's police power for the promotion of the peace, safety, health or welfare of the public. A limitation upon recovery is the natural consequence of the establishment of an insurance-type program. The court was impressed with the idea that severely injured patients would receive much less if malpractice insurance were unavailable or unused, and that the entire community, including severely injured malpractice victims, would benefit from the continued availability of health care. Hence, the limitation on recovery was found to comport with due

---

[13] *Id.* at 596.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 597.
[17] *Id.* at 598.

process of law.[18] Fair and substantial relationship was found between the classification involved and the purpose of the Act.[19]

The court approved the removal from the province of the jury of the determination of damages in excess of $500,000.00. The court held that the legislature left to the jury the right to fix damages within the $500,000.00 limit and that no more was required.[20]

Challenged as well was the right of the legislature to limit attorney fees to 15% of the recovery above $100,000.00. The appellants maintained that this limitation violated the plaintiff's freedom to contract for legal services. The court ruled the limitation a reasonable exercise of the police power "as a means of protecting the already diminished compensation due claimants from further erosion due to improvident or unreasonable contracts for legal service."[21]

A challenge was also directed to the two year statute of limitations starting to run on children at the age of six years. It was suggested that a child of such tender years was in no position to protect his rights. It was argued that the child's claim would be barred before he was old enough to assert his claim, thus depriving the child victim of his due process and equal protection rights. The court rejected this argument by observing that a health care provider may treat thousands of children per year and that each of these children is a potential malpractice plaintiff. The legislature could properly consider the large potential exposure, the general policy against stale claims, the fact that most children 6 years of age "are in a position to verbally communicate their physical complaints to parents or other adults having a natural empathy with them" who may "stand surrogate for the lack of maturity and judgment of infants," and finally, that licensed professional health care providers are "entitled to a special degree of trust."[22]

The appellants asserted that their due process, equal protection, and free speech rights as well as the separation of powers provisions of the Indiana and Federal Constitutions were abridged by the clause in the Act prohibiting an addendum clause in the prayer for relief. The court rejected this argument by asserting that any "alleged impingement must be weighed in the balance against the public health, welfare and safety served."[23] The court said that the

---

[18]*Id.* at 599.
[19]*Id.* at 601.
[20]*Id.* at 602.
[21]*Id.*
[22]*Id.* at 604.
[23]*Id.* at 605.

addendum clause could be misunderstood by the trier of fact and result in some "irrational inflation of the recovery."[24]

Finally, the Act was challenged on the theory that the credit of the state was being used in special aid of health care providers because the cost of administering the patient compensation fund is to be paid from public funds. The supreme court ruled that the statute did not expose the general funds of the state to loss or expense since all expenses and awards are to be paid out of the special fund, and that the Act was not special legislation since the classification was justified and the provisions of the Act are uniform throughout the state.[25]

1. Parents' Claims.—The court has indicated a determination to give the Act a wide mandate. In *Sui Yee Lee v. Lafayette Home Hospital, Inc.*,[26] parents brought an action for the loss of services of their minor daughter and for her medical expenses against certain health care providers. The parents had filed a proposed complaint with the Insurance Commissioner but had not completed the medical review process at the time they filed their suit. The trial court dismissed their case. The parents contended that their claim was not subject to the review requirements of the Medical Malpractice Act. They argued that since the Act refers only to actions by patients and representatives of patients, the maxim *expressio unius est exclusio alterius* applies and excludes their independent action as parents from the coverage of the Act. The court of appeals held that the maxim was not a rule of law but was merely an aid used by the courts to determine legislative intent.[27] The court then went on to hold that the intention of the legislature was clear. All persons having causes of action founded upon alleged medical malpractice are subject to, and must comply with, the Act as a jurisdictional prerequisite to suit.[28]

2. Statute of Limitations.—Perhaps the most potentially drastic change occasioned by the Act is its statute of limitations. The Act provides that "no claim . . . may be brought . . . unless filed within two (2) years from the date of the alleged act . . . . "[29] This provision has been interpreted by the court of appeals to mean that the two years begin to run at the moment the act of malpractice occurs. In *Atwood v. Davis*,[30] the court of appeals specifically rejected

---

[24]*Id.* at 604.
[25]*Id.* at 606.
[26]410 N.E.2d 1319 (Ind. Ct. App. 1980).
[27]*Id.* at 1324.
[28]*Id.*
[29]IND. CODE § 16-9.5-3-1 (1976).
[30]411 N.E.2d 759 (Ind. Ct. App. 1980).

the discovery rule. However, the court went on to reserve the question of the constitutionality of the Act under circumstances where the two years has run before the patient had actual or constructive knowledge that his physician has committed malpractice.[31]

A hint of how the court might decide this issue was provided by its citation of *Carrow v. Streeter*.[32] In *Carrow*, the plaintiff brought her action three years after the allegedly negligent surgery and about one year after discovery of the surgical errors. The trial court granted summary judgment because of the two year statute of limitations. On appeal, the appellate court reversed because there was a genuine issue of fact as to whether the doctrine of fraudulent concealment applied so as to toll the statute of limitations and whether the doctrine, if applicable, ceased tolling the statute of limitations more than two years before Carrow filed her complaint.[33]

The court in *Carrow* explained that if there is concealment of the cause of action, the statute is tolled during such concealment.[34] Usually, there must be some active effort at concealment, but where a fiduciary or confidential relationship exists, such as between physician and patient, there exists a duty to disclose material information between the parties. A failure to do so results in concealment. The statute ceases to be tolled after the plaintiff has discovered or should have discovered the existence of the cause of action. The statute continues to be tolled as long as the patient continues to reasonably rely on the advice of her physician. The last visit to the physician is not the controlling date. The physician-patient relationship continues as long as there is mutual assent to a course of treatment.[35]

The *Carrow* holding cannot be judged controlling since the operative facts occurred prior to the effective date of the Act. Nevertheless, it is reasonable to suggest that the dicta in *Atwood* and the holding in *Carrow* indicate that the court of appeals will interpret the statute in light of the Indiana Constitution so as to avoid depriving an innocent plaintiff of access to the courts for redress of grievances.

Some light is provided by the case of *Adams v. Luros*.[36] Adams first saw Dr. Luros, a neurosurgeon, for back pain and partial paralsis of his right leg in January, 1973. Dr. Luros admitted Adams to the hospital on two occasions and performed numerous tests but

---

[31]*Id.* at 761.

[32]410 N.E.2d 1369 (Ind. Ct. App. 1980).

[33]*Id.* at 1375-76.

[34]*Id.* at 1376.

[35]*Id.*

[36]406 N.E.2d 1199 (Ind. Ct. App. 1980).

was unable to diagnose the problem. In July of 1973, Dr. Luros told Adams to "live with it" until it got better or worse. In 1976, Adams began to have more severe symptoms. In 1977, the problem was diagnosed to be a tumor in the middle region of Adams' spinal cord. The tumor was removed on March 17, 1977, but left Adams without the use of his legs. Adams brought suit on February 26, 1977, contending that Dr. Luros failed to order a myelogram of the critical area and that such failure constituted malpractice.

Dr. Luros moved for, and was granted, summary judgment based upon the two year statute of limitations in the Medical Malpractice Act. The court of appeals reversed, holding that the act of alleged malpractice occurred before the Act became effective and that the old statute thus applied.[37] The court held that the old statute of limitations was tolled under the doctrine of fraudulent concealment.[38] Because of the fiduciary nature of the physician-patient relationship, the physician has a duty to disclose material information to the patient and a failure to do so results in a fraudulent concealment. The natural corollary to this rule is that when the relationship ends, the duty to disclose ends and the fraudulent concealment by silence ends.

In determining when the physician-patient relationship ends, the courts took to the subjective views of the parties, and to such objective factors as the frequency of visits, the course of treatment prescribed, the nature of the illness, the nature of the physician's practice, and whether the patient began consulting other physicians for the same malady.[39]

Of course, when the patient learns of the malpractice or gains information which should lead to discovery of the malpractice, the statute commences to run, regardless of the concealment. There is no particularly compelling reason why the humane doctrine of fraudulent concealment should not remain the law of Indiana.

3. Minors' Claims.—One of the potentially harsher aspects of the Act's statute of limitations is its treatment of minors' claims. In *Rohrabaugh v. Wagoner*,[40] a minor who was between the age of six and eighteen at the time of instituting her action and at the time of the alleged malpractice, brought suit against two health care providers who had separately diagnosed and treated a growth at her waistline know as a hemangioma. The action was instituted in 1979, more than two years after the effective date of the Act and the dates of the alleged wrongful acts. The Supreme Court of Indiana

---

[37] *Id.* at 1201.

[38] *Id.*

[39] *Id.* at 1203.

[40] 413 N.E.2d 891 (Ind. 1980).

upheld the dismissal of her case in view of the two year statute of limitations.[41] In doing so the court rejected all due process and equal protection arguments and held that there existed a reasonable basis for the legislature to strengthen the statute of limitations on malpractice cases and in furtherance thereof to conclude that children six years old and adults are similarly capable of bringing malpractice actions.[42]

4. Respondeat Superior.—On a more liberal note, the court of appeals laid to rest the old notion that a hospital could not be held liable under the principle of respondeat superior for the negligence of its nurses in carrying out a physician's orders. In *South Bend Osteopathic Hospital, Inc. v. Phillips*,[43] the court held that a hospital was liable under respondeat superior for the acts of its nurses in negligently administering a hypodermic injection prescribed by the patient's physician. The court held that where it was the normal and usual duty of the nurse to give the injection, the employing hospital was liable despite the fact that the hospital entity was prohibited from practicing medicine.[44] The court concluded that the controlling factor is not whether a particular act falls within the definition of "practicing medicine," but whether the act of the hospital employee was routine in nature and a part of the employee's duties.[45]

C. Attorney Malpractice

In *Shideler v. Dwyer*,[46] the plaintiff was the beneficiary of a clause in a will directing a shareholder of a corporation to retain plaintiff in the corporation's employ and upon her retirement to have the corporation pay her $500.00 per month. She quit her job before reaching her established retirement date and eventually sued the estate to enforce the will's provision. It was ultimately determined that the clause was merely precatory in form and impossible to perform by the estate and was therefore void.

The plaintiff sued the attorney who drafted the will, alleging malpractice. The suit against the lawyer was filed more than three years after the probate of the will, but less than two years after the probate court held the provision to be invalid. The attorney set up the statute of limitations as a defense. The trial court denied the defendant's motion for summary judgment but certified the cause for interlocutory appeal.

---

[41] *Id.*

[42] *Id.* at 895.

[43] 411 N.E.2d 387 (Ind. Ct. App. 1980).

[44] *Id.* at 390.

[45] *Id.* at 389.

[46] 417 N.E.2d 281 (Ind. 1981).

On transfer the Supreme Court of Indiana in a three to two decision ruled that the statute of limitations applicable to health care providers did not extend its protection to other professionals, including attorneys.[47] The court held that the two year statute of limitations generally applicable to torts applied and that the statute began to run at the death of the testator and not when the dispositive provision was determined by the probate court to be invalid.[48]

Justices Givan and Pivarnik registered a vigorous dissent. They argued that the statute of limitations should not have begun until the act of alleged malpractice was discovered, and that the discovery could not fairly be said to have occurred until the probate court determined the clause to be void.[49] The majority interpretation puts the potential devisee in the impossible position of trying to enforce the beneficial provision and at the same time sue the scrivener for negligent draftsmanship.[50]

D. Director Misconduct

In *Fleetwood Corp. v. Mirich*,[51] the court held that directors of a corporation acting for the corporation in the purchase of its stock occupy a fiduciary relation in respect to the shareholder from whom the stock is purchased and are under a duty to disclose to the shareholder the facts affecting the value of the stock.[52] The court distinguished this situation from one in which the director buys shares of stock for his own account. In the latter case, the director does not owe the shareholder a fiduciary duty of full disclosure unless the purchase of the shares will affect the general well-being of the corporation.[53]

E. Landowners, Farm Animals, and Duty Issues

In *Blake v. Dunn Farms, Inc.*,[54] the plaintiff was a passenger in an automobile which collided with a horse at night. The accident occurred on a portion of a state highway running through Dunn's land. Love had rented the pasture from tenants of Dunn who had vacated the premises prior to the accident. Inadequate fencing permitted the

---

[47]*Id.* at 283.

[48]*Id.* at 290.

[49]*Id.* at 297 (Givan, C.J., dissenting).

[50]*See* Comment, *Shideler v. Dwyer: The Beginning of Protective Malpractice Actions*, 14 IND. L. REV. 927 (1981).

[51]404 N.E.2d 38 (Ind. Ct. App. 1980).

[52]*Id.* at 46.

[53]*Id.*

[54]413 N.E.2d 560 (Ind. 1981).

horse to escape. Dunn knew or should have known of the defective fence and the presence of horses on the land.

The trial court granted summary judgment on the ground that defendant Dunn owed no duty to plaintiff to restrain a horse neither owned nor kept by Dunn. The court of appeals reversed and held that the duty of a landowner to a person on an adjacent road is similar to that of a landowner to an invitee, and that a landowner must exercise reasonable care to prevent harm to persons on adjacent highways by known domestic animals on his premises.[55]

On transfer, the supreme court vacated the decision of the court of appeals and affirmed the trial court's grant of summary judgment to Dunn Farms, Inc. The supreme court held that the mere fact that a landowner had casually observed horses in its field created no duty to be concerned that the horses might escape and cause injury to passing motorists.[56] The court held that it was the duty of the owner and the keeper of the animal to keep him confined, and that the mere possession or ownership of the land from which an animal strays is not sufficient to make the landowner liable, so long as the landowner is not the keeper of such animal.[57] If the landowner is neither the owner nor keeper, he has no duty to confine or restrain the animal. If an animal is allowed by its keeper to escape from its confinement and do harm, that damage results from the negligent confinement, and not from the condition of the land.

The supreme court also rejected the notion that the duty of a landowner to a person on an adjacent road is similar to that of a landowner to a business invitee. The duty of the business property owner to an invitee is an extra burden based upon the relationship of the owner or occupier of the land to the one he invites for his own benefit. Since motorists use the highway for their own purposes, they are not the invitees of adjacent landowners.[58]

The court of appeals limited the available theories of liability against the owner or keeper of a domestic farm animal to negligence. In *Thompson v. Lee*,[59] the court rejected strict liability and statutory negligence as viable theories. In this case, the plaintiff was driving his motorcycle on a blacktop country road in Rush County at 11:00 p.m. on May 19, 1978, when he suddenly came upon a black Angus cow owned by the defendant. The plaintiff Thompson braked but was unable to avoid the cow. He crashed and suffered serious injuries and the total loss of his motorcycle.

---

[55]*Id.* at 564.
[56]*Id.* at 563.
[57]*Id.*
[58]*Id.* at 564.
[59]402 N.E.2d 1309 (Ind. Ct. App. 1980).

Thompson brought suit against the defendant Lee upon the theories of strict liability, statutory negligence, and negligence. The trial court granted judgment on the evidence in favor of the defendant at the end of the plaintiff's case on the counts of strict liability and statutory negligence. The jury returned a defendant's verdict on the remaining negligence count.

The court of appeals affirmed, saying that strict liability may be imposed upon owners of animals that have caused injury while at large only if it is shown that the animal is *ferae naturae* and is by its nature ferocious or dangerous, because the law recognizes that safety lies only in keeping such animals secure; or under circumstances where a domestic animal commits a trespass *quare clausum fregit*, on the theory that the owner "trespassed with his cattle" and would be responsible for any damages resulting from breaking the close. The court held that the first basis for strict liability would not apply because a cow was not a wild animal and the second basis was inapplicable because the cow was not on Thompson's property.[60] The court concluded that this was a case of an escaped cow loose on the highway and as such, was controlled by the law of negligence.[61]

The court also held that Indiana Code section 15-2-4-21 would not provide a basis for statutory negligence in this case because there was no evidence that Lee permitted the cow to run at large.[62] The word "permit" in the statute means actual or constructive knowledge that the animal is no longer confined within an enclosure.[63] The evidence was that Lee did not know that his cow had escaped.

F. Landlord and Tenant

In *Rossow v. Jones*,[64] the plaintiff was a tenant in a house that had been converted into three apartments. All the apartments exited through a single outside door onto a porch. Three concrete steps led from the porch to the sidewalk. Jones slipped and fell on the steps as he was attempting to leave the house. The steps were covered with a natural accumulation of ice and snow. The landlord had shoveled the walks in the past but on this occasion he had allowed the ice and snow to accumulate for a week.

The court of appeals specifically rejected the doctrine of *Purcell v. English*,[65] and held that a landlord does have a duty to exercise

---

[60] *Id.* at 1313-14.
[61] *Id.* at 1311-12.
[62] *Id.* at 1313-14.
[63] *Id.*
[64] 404 N.E.2d 12 (Ind. Ct. App. 1980).
[65] 86 Ind. 34 (1882).

reasonable care to see that common ways and areas, or areas over which he has reserved control, are reasonably safe and fit for use. Hazards created through a natural accumulation of ice and snow are not beyond the scope of that duty.[66]

G. *Premises Liability and Landlord Invitees*

In another landlord liability case,[67] P.H. & T. Realty built a grocery store to specifications provided by A&P and leased the building to A&P for a specified term. At the end of the term, A&P gave notice of its intention to quit the premises and proceeded to so do. A&P locked the store after removing its fixtures and merchandise and gave the keys to P.H. & T. Realty. P.H. & T. Realty boarded up the windows and secured the services of a realtor to re-lease the store. The realtor took the plaintiff to see the building. Neither Wilson nor the realtor could find the lights. As they walked about in the darkened store, Wilson fell through an opening in the floor designed to house a conveyor used to bring merchandise up from the basement storage area.

A&P appealed an adverse judgment. The appellate court reversed and held that once A&P moved out and surrendered possession of the building to P.H. & T. Realty, its responsibility for the condition of the premises was at an end. The court rejected the idea that a tenant retained some residual liability for the condition of the property after moving out. Liability for injury ordinarily depends upon the power to prevent injury and therefore rests upon the person who has control and possession through ownership, lease, or otherwise.[68]

The court did indicate that A&P could be held liable for any failure to disclose a known latent defect that it had reason to believe would not be discovered until such time as P.H. & T. Realty discovered it and had time to take precautions to prevent harm. Since P.H. & T. Realty knew of the conveyor opening in the floor, this principle would not apply.[69] The court concluded that the causative act leading to the injury to Wilson was the act of permitting Wilson and others to enter, unsupervised, into a vacant, locked, boarded-up, darkened building to wander about as they pleased. Since A&P had no power of control over the building, it was not legally responsible for Wilson's misfortune.[70]

---

[66]404 N.E.2d at 14.

[67]Great Atl. & Pac. Tea Co. v. Wilson, 408 N.E.2d 144 (Ind. Ct. App. 1980).

[68]*Id.* at 148.

[69]*Id.* at 150.

[70]*Id.*

H. Vendor-Purchaser and Unknown Defects

In *Pennycuff v. Fetter*,[71] the plaintiff purchased a clubhouse and swimming pool from the defendants. The facility was constructed in 1931. The defendants had owned the club a short time. On November 14, 1978, the defendants had the water shut off for the winter. They negligently, but unknowingly, failed to properly drain the pipes servicing the pool. In February, 1979, the defendants sold the property to the plaintiff and at the time told the plaintiff that the pool was basically in good enough shape for opening in the spring. During the winter, the pipes froze and extensive repairs were required.

The plaintiff sued for damages based on implied and express warranties and representations. The trial court awarded damages. On appeal, the judgment was reversed. The court of appeals held that this was not a sale of goods under the Uniform Commercial Code but a sale of real estate with improvements.[72] Furthermore, it was not the sale of a home by a builder-vendor. Therefore, no implied warranties were possible in the transaction. The plaintiff's cause of action was limited to the defendants' oral representations that the pool would be ready to open in the spring.[73]

The court held that *caveat emptor* applies in this kind of transaction. A purchaser of property has no right to rely upon the representations of the vendor of the property as to its quality where he has a reasonable opportunity to examine the property and judge its qualities for himself.[74] In order to recover against the defendant, the plaintiff must prove fraud. Since there was no evidence that the defendants knew of their negligence, or that the pipes had burst at the time of sale, there was no fraud and hence there could be no recovery.

I. Slander of Title and Punitive Damages

In *Harper v. Goodin*,[75] the defendant filed a mechanic's lien against the plaintiff's house after they purchased it from the builder and 132 days after the last work on the home was completed. After the builder paid the defendant, the defendant refused to remove the mechanic's lien. The plaintiff filed a slander of title action against defendant and asked for compensatory and punitive damages. The court awarded $385.00 compensatory damages and $2500.00 punitive damages.

---

[71] 409 N.E.2d 1179 (Ind. Ct. App. 1980).

[72] *Id.* at 1180.

[73] *Id.*

[74] *Id.*

[75] 409 N.E.2d 1129 (Ind. Ct. App. 1980).

On appeal it was held that a slander of title occurs when untrue statements are made maliciously and the plaintiff sustains a pecuniary loss as a necessary and proximate consequence of the slanderous statements.[76] To support an award of punitive damages, actual malice must be shown. "[M]alice is publishing matter with knowledge that it is false or with reckless disregard as to whether it is false or not." " '[R]eckless disregard of a statement's probable falsity' " occurs when the " 'defendant in fact entertained serious doubts as to the truth of the statement.' "[77] The court held that malice could be inferred from the fact that the defendant filed his lien on the plaintiff's property without any contractual relationship existing between them, after the sixty day period for filing such a lien had lapsed, and then refused to remove the lien after he was paid in the face of a demand that he do so.[78] The court pointed out that there is a statutory duty to remove the lien, that the jury could infer that the defendant was attempting to coerce the plaintiff into paying a debt owed the defendant by the builder, and that punitive damages were properly awarded.[79]

J. Duty, Discretionary Functions, and the Tort Claims Act

1. Discretionary Function.—In *Indiana State Highway Commission v. Rickert*,[80] the plaintiff's decedent was a passenger in an airplane that crashed into a highway overpass located 180 feet from the southern edge of the runway in the approach path of planes landing at Hap's Airport. The airport was constructed in 1953 and the highway was built in 1959. The highway overpass was sixteen feet higher than the elevation of the runway. This meant that the overpass was about seven feet higher than the maximum allowed by an Indiana statute[81] which provided that unless a permit has been issued by the Aeronautics Commission, no structure could be erected within the inner area approach zone to any runway for a distance extending 3,000 feet from the end of the runway to any height which would interfere with the established glide angle one foot of vertical height for each twenty feet of horizontal distance from the end of the runway.

The court held that this statute did give rise to a duty to the decedent owed by the Commission even though the Commission was

---

[76]*Id.* at 1134.

[77]*Id.* at 1135. (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and quoting St. Amant v. Thompson, 390 U.S. 727 (1968)).

[78]409 N.E.2d at 1135.

[79]*Id.* (citing IND. CODE § 32-8-1-2 (1976)).

[80]412 N.E.2d 269 (Ind. Ct. App. 1980).

[81]IND. CODE § 8-21-7-3 (1976).

not specifically named as a party subject to its provisions. The Commission was found negligent per se for designing and constructing the non-conforming overpass.[82] This was true even though the state had paid the airport an inverse condemnation award for use of the air space, because the plaintiff was not a party to the condemnation litigation.[83]

The court also rejected the argument that the design and construction of highways, as well as the decisions as to whether to sue the airport for the wrongful use of the condemned air space or to apply for a permit with the Aeronautics Commission, involved the performance of discretionary acts. The court held that once the decision had been made to proceed with the project, a duty devolved upon the Commission to exercise reasonable care in the design and construction of the overpass.[84]

Similarly, in the case of highway signs, the court of appeals has taken the position that once the decision for a sign has been made, compliance with the Indiana Manual on Uniform Traffic Control Devices for Streets and Highways is required.[85]

At the intersection of two county highways the only traffic control device was a yield sign that did not conform to the design requirements of the Indiana Manual on Uniform Traffic Control Devices for Streets and Highways. The county contended that nonconformity with the Manual could not be the basis for a claim because of the Immunity Statute, and because the Manual is merely a guide for discretionary acts rather than a source of mandatory directives for ministerial performances.[86]

On appeal both contentions were rejected. The court of appeals held that the Immunity Statute did not apply because nonconformity with the Manual does not constitute a failure to promulgate or enforce laws.[87] The Immunity Statute was inapplicable because adherence to the Manual has been specifically required of all counties in Indiana by the legislature. While the placement of the sign in the first instance may be a discretionary act, the placement and maintenance of the sign must conform to the directives in the Manual.[88]

2. Special Duty.—In *Crouch v. Hall*[89] the mother of a rape-murder victim brought a tort claim action against the City of Indianapolis and certain police officers for the death of her child. The

---

[82]412 N.E.2d at 277.

[83]*Id.*

[84]*Id.* at 278.

[85]*See* Harvey v. Board of Commissioners, 416 N.E.2d 1296 (Ind. Ct. App. 1981).

[86]*Id.* at 1299.

[87]*Id.*

[88]*Id.*

[89]406 N.E.2d 303 (Ind. Ct. App. 1980), *transfer denied*, November 3, 1980.

theory was that the police had negligently failed to investigate the rape of another woman by the victim's assailant.

The appellate court approved the granting of summary judgment for the defendants because the investigation of crime is a discretionary function under the Indiana Tort Claims Act.[90] In the absence of corrupt or malicious motives, police officers are not personally liable for errors or mistakes of judgment in the performance of duties involving the exercise of judgment and discretion.[91] The legal duty of the police is owed to the general public as a whole, and not to individual citizens absent a special duty or special relationship to the individual.

3. Immunities.—The court of appeals showed no inclination to liberally construe the immunities section of the Tort Claims Act. In *Walton v. Ramp*,[92] the plaintiff Walton's automobile hit a patch of ice in the road causing him to lose control of his automobile and crash. Walton sued an adjoining landowner named Ramp and the Decatur County Board of Commissioners on the theory that Ramp diverted water from his property onto the county road and the Commissioners were negligent in not taking steps to correct the situation, or at least giving warning of the danger. The Commissioner obtained a summary judgment because the trial court found that the icy highway was a temporary condition resulting from weather, which is one of the special immunities found in the Tort Claims Act.[93]

The court of appeals reversed, holding that a governmental entity is bound to exercise reasonable care and diligence to keep its streets in a reasonably safe condition for travel.[94] The Tort Claims Act does not alter the common law.[95] A county is ordinarily not liable for injuries caused by defects in its streets due to material accumulations of ice and snow. However, the diversion of water onto the road by an adjoining landowner is not a natural accumulation or a temporary condition resulting from the weather. Where the defect is caused by a third person, the negligence for which the governmental entity is liable is not the creation of the defect, but the failure to remove or guard the defect after actual or constructive notice thereof.

4. Statutory Notice.—The court of appeals continued to display a remarkable affection for the 180 day statutory notice requirement.

---

[90]*See* IND. CODE §§ 34-4-16.5-1 to -16.8-8 (1976).

[91]406 N.E.2d at 304.

[92]407 N.E.2d 1189 (Ind. Ct. App. 1980).

[93]IND. CODE § 34-4-16.5-3 (Supp. 1981).

[94]407 N.E.2d 1189, 1191 (Ind. Ct. App. 1980).

[95]*Id.*

Just why the court insists on giving the notice statute the widest possible application remains a mystery. The statute itself is innocuous enough. It simply provides that a claim is barred unless the appropriate agency of government is given notice of the claim within 180 days after the loss occurs.[96] Instead of giving the statute an interpretation which would protect the government against the hazard of unreported stale claims and assure an injured person access to the courts for redress of grievances, the court of appeals uses every opportunity to give the statute the most punitive possible interpretation. A perfect example of this tendency is provided by the case of *Hedges v. Rawley*.[97]

On June 13, 1975, the plaintiffs, who were employees of the sewer department of the City of Terre Haute, were accused of stealing gasoline by their supervisor and were prosecuted for theft. They were fired from their jobs at the time prosecution was initiated. They were found not guilty of theft on November 25, 1975. On December 4, 1975, they filed a grievance with their union in which they sought reinstatement to their jobs and back pay. In April, 1976, they notified the City of their claim for slander and malicious prosecution. The court of appeals held that the filing of a grievance seeking back pay and reinstatement with the union did not satisfy the statutory notice of claim requirement[98] because it contained no statement or allegation of tortious conduct by the city or its supervisors.[99] The court also held that the city's actual knowledge of the incident and routine investigation was not sufficient notice under the Tort Claims Act.[100] The slander count was dismissed because notice of the claim was filed more than 180 days after June 13, 1975.[101]

The malicious prosecution count was timely filed because it did not accrue until the plaintiffs were found not guilty on November 25, 1975. However, the plaintiffs had no cause of action against the city or its supervisors because the Tort Claims Act bars an action against a city or a municipal employee for causing a prosecution to be initiated.[102] The court rejected the plaintiffs' argument that the statute provides immunity only for police and prosecutorial authorities. The court said that the legislature used broad language and clearly meant to exempt governmental units and their employees

---

[96]IND. CODE § 34-4-16.5-7 (Supp. 1981).
[97]419 N.E.2d 224 (Ind. Ct. App. 1981).
[98]IND. CODE § 34-4-16.5-9 (1976).
[99]419 N.E.2d at 227.
[100]*Id.*
[101]*Id.* at 226.
[102]IND. CODE § 34-4-16.5-3 (1976).

while acting in the course and scope of their employment from malicious prosecution claims.[103] The court did hint that if bad faith could be shown, the result might be different.[104]

Another illustrative case was *Burks v. Bolerjack*.[105] The plaintiff, a sheriff's deputy, was charged with the crime of conspiracy to aid in a jail break. The prosecutor dismissed the charge after a jury was unable to reach a verdict. The plaintiff sued the county and the sheriff for false imprisonment. The county was dismissed because the statutory notice was not given within 180 days. The court held that the notice statute does not protect a government employee against a claim for false imprisonment.[106] It specifically held that Indiana Code section 34-4-16.5-5(a) did not bar a suit against the sheriff because the employing governmental agency was granted dismissal in view of the failure of the plaintiff to comply with the 180 day notice requirement.[107]

It would thus appear that the 180 day notice requirement has a life of its own in Indiana. The only indication that some flexibility might be available is found in *Lawrence County Commissioners v. Chorley*[108] in which the court of appeals found a waiver of strict compliance when the plaintiff verbally contacted a commissioner and was told to deal with the county's insurance carrier.[109] It is to be hoped the court will use the waiver exception to the formal notice requirement more often to avoid harsh results when the governmental agency has in fact had notice of the situation and has investigated the facts and can show no relevant prejudice to its defense.

K. School Officials

Since *Wood v. Strickland*,[110] an action for damages has been available to students whose constitutional rights have been violated if the student can establish that the official acted with malice.[111] Malice can be established by showing that the official acted with impermissible motivation or with such disregard of the student's clearly established constitutional rights that his actions could not reasonably be characterized as being in good faith.[112]

---

[103]419 N.E.2d at 227.
[104]*Id.* at 228.
[105]411 N.E.2d 148 (Ind. Ct. App. 1980).
[106]*Id.* at 150-51.
[107]*Id.* at 151.
[108]398 N.E.2d 694 (Ind. Ct. App. 1979).
[109]*Id.* at 698.
[110]420 U.S. 308 (1975).
[111]*Id.* at 322.
[112]*Id.*

These principles were reviewed by the Seventh Circuit Court of Appeals in the case of *Doe v. Renfrow*.[113] In *Doe*, school officials, in concert with police authorities, conducted a search of a junior high school for drugs. All 2,780 students were searched and sniffed by a trained police dog. The thirteen year old female plaintiff and three other students were also strip searched. The school search lasted three hours. There was no probable cause to believe that the plaintiff, or any of the other students, was in possession of a controlled substance. The court held that the qualified immunity from liability of school officials "acting in good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances, and not in ignorance or disregard of settled undisputable principles of law," was exceeded.[114] The court determined that the thirteen year old student could seek damages against the school officials for humiliation and the deprivation of her basic constitutional rights.[115]

L. Defamation

Indiana courts ruled on three interesting defamation cases during the Survey period. Defamation involves the idea of disgrace; "[i]t requires a communication to a third party which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him."[116]

In *Cua v. Ramos*,[117] the plaintiff was dismissed from her job as a staff psychiatrist at Central State Hospital. She brought suit against her former supervisors for libel, alleging that they filed a work report which defamed her. The report was fairly calculated to produce, and would naturally engender in the mind of the average person the impression that, although Cua knew how to do her job, she would not do her job. The report conveyed the idea that she was incompetent as a psychiatrist at Central State Hospital. The unmistakable import of the report clearly injured Cua's reputation, specifically her reputation as a psychiatrist. The report was unambiguously defamatory. The court of appeals therefore found that the plaintiff's tendered instruction to this effect should have been given.[118]

---

[113]631 F.2d 91 (7th Cir. 1980).
[114]*Id.* at 92.
[115]*Id.* at 93.
[116]W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 111, at 739 (4th ed. 1971).
[117]418 N.E.2d 1163 (Ind. Ct. App. 1981).
[118]*Id.* at 1168-69.

1. Privilege.—There are certain recognized circumstances in which one has a privilege to say defamatory words regarding another. Generally, these exceptions are limited to governmental proceedings and activities conducted by the three branches of government and their agents. Exception is also extended to situations in which the plaintiff has consented to the publication, the third party is the spouse of the defendant, or the publication is a political broadcast.[119]

The case of *Foster v. New*[120] provides an excellent example of the limits the courts have placed upon the exercise of this privilege. Foster was accused by New of engaging in illegal drug activities while New was serving as a deputy prosecutor in Marion County. After leaving office, and severing his relationship with the prosecutor's office, New again told newspaper reporters that he believed that Foster was involved in drug dealing, although a grand jury had refused to indict Foster.

Foster brought an action for defamation against New. New raised the defense of prosecutional immunity. The court of appeals ruled that a prosecutor enjoys absolute immunity from civil liability for his actions in carrying out his official duties.[121] Included among those duties are his actions as the State's advocate and the duty to inform the public as to his investigative, administrative, and prosecutorial activities. The public interest in a prosecutor's ability to vigorously and fearlessly perform his duties unhindered by the threat of lawsuits is great, and such interest justifies foreclosing an injured plaintiff from pursuing his cause of action against a prosecutor. However, this immunity ceases when a prosecutor leaves office.[122] Otherwise, the immunity would amount to a continuing privilege to employ defamatory language concerning any person who was, during New's tenure in office, the concern of the prosecutor's office.

2. Qualified Privilege.—The courts have also recognized a zone of qualified privilege to protect one in the discharge of some public or private duty, whether legal or moral, or in the conduct of one's own affairs, in matters where one's interests are concerned.[123] The parameters of this qualified privilege were discussed in *Elliott v. Roach.*[124] Elliott rented a house, and as an incident to the rental posted a damage deposit. He later moved from the house and made a demand that his deposit be returned. The landlord and the rental

---

[119]W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 115 (4th ed. 1971).
[120]407 N.E.2d 271 (Ind. Ct. App. 1980).
[121]*Id.* at 274.
[122]*Id.*
[123]W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 115 (4th ed. 1971).
[124]409 N.E.2d 661 (Ind. Ct. App. 1980).

agent refused saying that Elliott was not entitled to a refund because he moved from the house in less than a year. Elliott wrote to the Indiana Real Estate Commission, with copies to the Indianapolis Board of Realtors, the Indianapolis Real Estate Brokers Association, and the Better Business Bureau, in which he charged that his landlord and the rental agent were "dishonest, unscrupulous, and unworthy of the trust or patronage of their customers or tenants."[125]

Elliott filed suit in municipal court to recover his damage deposit and asked for punitive damages. The landlord and the real estate agent counterclaimed for defamation. The trial court awarded Elliott $40.00 and the defendants $5,500.00 on their defamation counterclaim. On appeal the judgment was affirmed.

The court of appeals rejected Elliott's claim that he had a qualified privilege to write the letter to the above-named organizations. The court recognized a qualified privilege but limited it to the internal communication within organizations and to reports made to public authorities.[126] The privilege attaches only if the communication was made in good faith to serve the interests of the publisher and the person to whom it is addressed, and it does not exist if the privileged occasion was abused. There is no privilege if the publication was made primarily for the purpose of furthering an interest that is not entitled to protection, or if the defendant acted recklessly or principally through motives of ill will.[127] The court of appeals held that the trial court could reasonably have found that the copies mailed to the non-licensing professional associations constituted abuse of the privilege through excessive publication and was made to injure the landlord and her agent and to pressure them into paying his demand, and was, thus, not a protected utterance.[128]

3. Memory of the Dead.—The requirement that the defamatory words be directed at the plaintiff and injure his interest in his own reputation was reaffirmed by the court of appeals in *Lee v. Weston.*[129] There, the eighteen year old son of the plaintiffs was found dead. The coroner ordered an autopsy. Before the autopsy could be performed, the body was embalmed. It was alleged that the embalming process could alter the accuracy of the autopsy. Nevertheless, the coroner found that the plaintiffs' son died due to "[a]spirations of body content/Due to overdose," a cause that the plaintiffs claimed was not substantiated by medical evidence.

---

[125]*Id.* at 677.
[126]*Id.* at 690.
[127]*Id.* at 680.
[128]*Id.*
[129]402 N.E.2d 23 (Ind. Ct. App. 1980).

The plaintiffs sued the coroner for defamation. The court of appeals held that no action would lie. A libel upon the memory of a deceased person that does not directly cast any personal reflection upon his relatives does not give them any right of action.[130] That they may have suffered mental anguish, or sustained an impairment of their social standing among a considerable class of respectable people in the community in which they live by the disclosure that they were related to the deceased does not give them standing to sue for defamation. One who defames the memory of the dead is not liable civilly to the estate of the deceased or his relatives.

M. Retaliatory Discharge

In *Campbell v. Eli Lilly & Co.*,[131] the plaintiff was employed as a technical associate in the research section of the defendant pharmaceutical manufacturer and worked at different times as a technical associate for three separate research teams conducting research on various drugs. He had no written contract of employment with Lilly, and there was no agreement as to a definite term of employment.

The plaintiff told senior Lilly officials that he had knowledge of various acts of misconduct on the part of the supervisors under whom he had worked. He also questioned the safety of some of the company's drugs and made other accusations. Essentially, he charged his superiors with serious violations of United States Food and Drug Administration rules, regulations, and reporting requirements pertaining to the development and testing of drugs. Lilly conducted an in-house investigation of the plaintiff's charges and concluded that his accusations were totally false. Shortly thereafter, he was discharged.

The plaintiff brought an action against defendant seeking damages and reinstatement based upon his discharge by Lilly. The court of appeals held that in complaining to Lilly officials about its products and personnel, he was not exercising a right conferred upon him or protected by statute.[132] His claim for retaliatory discharge did not state a valid claim under Indiana law. There is no recognized public policy restricting the right of an employer to discharge an at will employee for "whistle-blowing."[133]

In a vigorous dissent, Judge Ratliff urged the court to extend

---

[130] *Id.* at 24.

[131] 413 N.E.2d 1054 (Ind. Ct. App. 1980), *transfer denied*, 421 N.E.2d 1099 (Ind. 1981). Hunter, J. dissented from the denial of transfer and filed an opinion at *id.*

[132] 413 N.E.2d at 1061. For further discussion of this case, *see* Galanti, *Corporations & Business Associations, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 31, 54 (1981).

[133] *Id.*

the "public policy exception," which protects an at will employee whose discharge seriously undermines some compelling public policy, to protect the responsible "whistle-blower." Judge Ratliff observed that "[n]either crystal ball nor prophetic power is required in order to discern that if such a whistle-blower may be retaliatorily discharged without recourse, the intimidating effect upon other employees will ensure that the first whistle-blower will also be the last."[134]

Judge Ratliff would extend the "public policy exception" to grant a right of action for damages to any employee whose wrongful and retaliatory discharge contravenes clearly established public policy or is obnoxious to said policy.[135] If the employee could establish that he was dismissed in retaliation for the exercise of any right or duty granted or required by such strong public policy, he would be entitled to recover damages.[136]

In *Scott v. Union Tank Car Co.*,[137] the plaintiff was, as in *Campbell*, an at will employee. Allegedly, he was fired for filing a workman's compensation claim. He brought suit claiming retaliatory discharge more than two years after he was terminated. The court held that discharge "which is intended to cause an invasion of an interest legally protected from intentional invasion" is a tortious act.[138] Discharging an employee for filing a workman's compensation claim does constitute such an invasion and does state a claim for relief. However, in the instant case, a motion to dismiss was properly granted because the claim was not filed within the two year statute of limitations.[139]

N. Personal Service Contracts and Punitive Damages

In *Peterson v. Culver Educational Foundation*,[140] the plaintiff was discharged, before the expiration of his written employment contract, as an instructor at the defendant's military academy. He had been accused by two female students of making sexual advances toward them, and by two upper classmen of countermanding the commands of student officers, criticizing student officers in an improper manner, and making derogatory remarks about them. The superintendent investigated the charges, conferred with parents, took statements from the accusing students, and questioned the

---

[134] *Id.* at 1067 (Ratliff, J., dissenting in part).
[135] *Id.*
[136] *Id.*
[137] 402 N.E.2d 992 (Ind. Ct. App. 1980).
[138] *Id.* at 993.
[139] *Id.*
[140] 402 N.E.2d 448 (Ind. Ct. App. 1980).

plaintiff regarding the charges. After completing the investigation, the superintendent discharged the plaintiff.

The plaintiff sued for wrongful discharge and sought both compensatory and punitive damages. The jury reached a conclusion at variance from that of the superintendent on the facts of the allegations and awarded the plaintiff compensatory and punitive damages. The court of appeals affirmed the award of compensatory damages but reversed the award of punitive damages.[141]

Punitive damages could not be awarded absent proof of a common law intentional tort such as fraud or proof that a serious wrong, tortious in nature, had been committed in an instance in which the public interest would be served by the deterrent effect punitive damages would have upon the future conduct of the wrongdoer and parties similarly situated.[142] An award of punitive damages in a contract action is based on findings which place emphasis on the defendant's state of mind. There must be evidence of "fraud, malice, gross negligence, or oppression mingled in the controversy."[143]

O. Explosives, Proximate Cause, and Damages

In the case of *Bridges v. Kentucky Stone Co.*,[144] Bridges' home was bombed by a third party who stole dynamite from the defendant. Bridges' case against the defendants was based on the theory that it negligently kept and stored dynamite. The trial court granted summary judgment on the theory that the negligent storage of the dynamite was not the proximate cause of the injury to Bridges.

The court of appeals reversed, holding that proximate cause is a jury question. The defendant's liability for the harm caused to Bridges depended upon whether it could have foreseen or reasonably anticipated that its negligent manner of storage of dynamite would result in a theft and that the thief would use the explosive to harm others.[145] An intervening criminal act by an independent third party, however, does not necessarily interrupt the relation of cause and effect between negligence and injury. "If at the time of the negligence, the criminal act might reasonably have been foreseen, the causal chain is not broken by the intervention of such an act."[146] The court went on to point out the detailed measures mandated by federal law to prevent theft of explosives. It concluded by observing that a jury question was presented on the issue of

---

[141]*Id.* at 462.
[142]*Id.* at 454.
[143]*Id.* at 458.
[144]408 N.E.2d 575 (Ind. Ct. App. 1980).
[145]*Id.* at 577.
[146]*Id.*

proximate cause by proof of a failure to comply with the anti-theft requirements of federal law.

In another explosives case,[147] the Seventh Circuit Court of Appeals permitted the jury to choose between the cost of repair and the differential fair market value measure of damages to arrive at a just award.[148] The plaintiffs had claimed that the defendant had damaged the foundation and walls of their home by blasting operations in connection with coal mining. The court of appeals held that damage to real estate caused by continuous blasting is a unique situation. The trial court thus properly expanded the established definition of permanent injury and permitted the jury to choose between the cost of repair and the differential fair market value of the real estate in assessing an award.[149]

P. Wrongful Death

Indiana courts of review continued on their very conservative path in the area of wrongful death.

1. Damages.—In *Lustick v. Hall*,[150] the court held that a non-custodial parent who was apparently not obligated to pay support could nevertheless be found to be partially supporting her children by providing them with care, attention, and domestic services.[151] However, the court ruled that since she was not at the time of her death contributing to the financial support of the children, evidence of her ability to earn money was for purposes of a wrongful death action properly excluded as was proffered economic value testimony of an economist.[152]

In *Boland v. Greer*,[153] the parents appealed a $10,000.00 award of damages for the wrongful death of their nineteen year old son. They contended that parents should be allowed to recover for the loss of love and companionship of their child, and to recoup expenditures made in maintaining and caring for their minor child from the time of his birth until death.

The court of appeals declined the opportunity to adopt either the "investment theory" or to allow for intangible losses. The court held that the measure of damages in a case of this kind is the value of the child's services from the time of death until he would have at-

---

[147]Baumholser v. Amax Coal Co., 630 F.2d 550 (7th Cir. 1980).

[148]*Id.* at 553.

[149]*Id. See* General Outdoor Advertising Co. v. LaSalle Realty Corp., 141 Ind. App. 247, 218 N.E.2d 141 (1966).

[150]403 N.E.2d 1128 (Ind. Ct. App. 1980).

[151]*Id.* at 1132.

[152]*Id.* at 1132-33.

[153]409 N.E.2d 1116 (Ind. Ct. App. 1980).

tained his majority taking into consideration his prospects in life less the cost of his support and maintenance during that period including board, clothing, schooling, and medical attention.[154] To this may be added, in proper cases, the expenses of care and attention to the child made necessary by the injury, medical services, and funeral expenses.[155]

The court also rejected an equal protection challenge to the pecuniary loss measure of damages in child death cases. The court held that "[t]he mandate of equal protection requires the law to treat alike those who are similarly situated."[156] The court explained that a wife suing for the death of her husband or a child suing for the death of a parent are allowed different elements of damages because their situations are different.[157]

2. Contributory Negligence.—In *Parrett v. Lebamoff*,[158] the court had an opportunity to move away from the strict enforcement of the contributory negligence rule. The defendant tavern sold Parrett alcoholic beverage after he had become intoxicated. Parrett crashed his automobile and was killed. His widow brought a wrongful death action against the tavern alleging violation of an Indiana Code provision[159] which makes it a misdemeanor to provide alcohol to one who is intoxicated. The trial court dismissed the claim for failing to state a cause of action. On appeal the case was reversed and remanded. The court of appeals held that the statute does impose a duty which will serve as the premise for a civil action for damages.[160]

The plaintiff argued that contributory negligence was not a defense because it would defeat the legislative purpose to bar a member of the protected class from recovery on account of his contributory negligence. The court of appeals rejected this contention on the grounds that the statute did not place the entire responsibility for the ensuing harm upon a violator of the statute.[161] The court noted that the plaintiff's negligence would not bar recovery if it could be shown that the actions of the defendant were willful, wanton, or reckless.[162]

3. Common Law Guest Statute.—In *McDonnell v. Flaharty*,[163] the Seventh Circuit Court of Appeals created a common law guest

---

[154]*Id.* at 1119.
[155]*Id.*
[156]*Id.*
[157]*Id.* at 1120.
[158]408 N.E.2d 1344 (Ind. Ct. App. 1980).
[159]IND. CODE § 7.1-5-10-15 (1976) (amended 1978).
[160]408 N.E.2d at 1345.
[161]*Id.* at 1346.
[162]*Id.*
[163]636 F.2d 184 (7th Cir. 1980).

statute for boat owners. In *McDonnell* the plaintiff's husband drowned when a pontoon boat belonging to the defendant capsized, throwing the passengers into the water. The plaintiff's claim sounded in negligence. The court held that a boat owner was liable only for willful, wanton, or intentional injuries to his guest.[164] This result was predicated on Indiana's policy as expressed in the guest statutes applicable to automobiles[165] and aircraft[166] and the decisional law regarding the duty owed by real property owners to their social guests. The court held that Indiana's policy was to foster hospitality by insulating hosts from negligence suits by their guests.[167]

4. Procedural Requirement.—An important point of procedure in wrongful death cases was illustrated in *General Motors Corp. v. Arnett.*[168] In that case, the plaintiff brought suit against GM for the wrongful death of her husband within two years after his death. However, she was not duly appointed as the personal representative of his estate until four months after the statutory period had expired. GM contended that it was entitled to judgment as a matter of law, because Mrs. Arnett had not possessed the legal capacity to bring this action at any time during the statutory period. The court of appeals agreed. Mrs. Arnett could not maintain her action against GM because she failed to meet a condition precedent attached to the right to sue conferred by the Wrongful Death Statute.[169] The procedural rules governing relation back of amendments[170] and the naming of the real party in interest[171] could not create a new substantive right for Mrs. Arnett in place of the one she lost.[172] In an Indiana wrongful death action, neither the belated appointment itself nor an amended complaint can relate back to the time of the original filing.[173]

---

[164]*Id.* at 186-87.
[165]IND. CODE § 9-3-3-1 (1976).
[166]*Id.* § 8-21-5-1.
[167]636 F.2d at 187.
[168]418 N.E.2d 546 (Ind. Ct. App. 1981).
[169]*Id.* at 548.
[170]IND. R. TR. P. 15(C).
[171]IND. R. TR. P. 17(A).
[172]418 N.E.2d at 549.
[173]*Id.*

XVIII. Workers' Compensation

JORDAN H. LEIBMAN*

During this survey period, the Indiana Court of Appeals and the Indiana Supreme Court admonished the Industrial Board to provide more specific findings of fact to support its awards in cases dealing with medical evidence bearing on the questions of impairment and disability.[1] The exclusivity of the remedy provided by the Indiana Workmen's Compensation Act was generally upheld.[2] An injury which was not initially disabling but which later progressed to a disability was held to date from the moment of disability and not from the date of occurrence.[3] The failure to provide prompt notice to the employer of a progressive injury was held not to be fatal to an injured employee's claim, absent a showing by the employer of prejudice resulting from the lack of notice.[4] A recurrent injury after the worker left employment will trigger additional benefits from the original employer when the recurrence prevents the otherwise willing worker from accepting other employment.[5] Work-related emotional trauma was held legally sufficient to produce a compensable heart attack,[6] and the Act's ceiling on non-medical benefits was held to take priority over a subsidiary provision containing a formula which provided for an award in excess of the ceiling.[7] Additionally, the Indiana General Assembly amended the Act in 1981 to provide that certain injured vocational student workers would have their benefits for permanent impairment calculated as if they were full time workers.[8]

A. *Permanent Total Disability*

1. Medical Evidence.—In *Perez v. United States Steel Corp.*,[9] claimant Benedicto Perez sustained a work-related injury which the

---

*Assistant Professor of Business Law, Indiana University School of Business; Former Vice-President and Plant General Manager of Imperial Packaging Company, Inc.—Indianapolis; Member of the Indiana Bar; B.A., University of Chicago, 1950; M.B.A., University of Chicago, 1955; J.D., Indiana University School of Law—Indianapolis, 1979.

[1]*See* notes 9-49 *infra* and accompanying text.

[2]*See* notes 50-132 *infra* and accompanying text.

[3]*See* notes 147-51 *infra* and accompanying text.

[4]*See* notes 133-46 *infra* and accompanying text.

[5]*See* notes 152-59 *infra* and accompanying text.

[6]*See* notes 160-73 *infra* and accompanying text.

[7]*See* notes 174-80 *infra* and accompanying text.

[8]*See* notes 181-88 *infra* and accompanying text.

[9]416 N.E.2d 864 (Ind. Ct. App. 1981).

Board determined to be a twenty percent permanent partial impairment.[10] Perez had claimed that he was "permanently totally *disabled*," however, the Board made no express finding with respect to disability.[11] Perez appealed this original finding in 1977 to the Indiana Court of Appeals, which distinguished impairment from disability and held that a finding of partial impairment did not preclude a finding of total disability.[12] The court reversed and remanded the case on this issue directing the Board to permit additional evidence on the question of permanent total disability.[13] After receiving additional evidence, the Board reaffirmed its prior award and Perez appealed once more, in this instance challenging the sufficiency of the findings and urging that the evidence compelled the opposite result.[14]

The court of appeals, in affirming the Board's second decision, discussed the sufficiency of an administrative board's findings for purposes of appellate review. Findings, the court said, are used to "illuminate the reasons for decision . . . . [A] finding which states merely that 'witness A testified that such-and-such occurred' is inadequate as a factual finding that the event indeed did occur. Such a conclusion—that the fact finder believed the witness—is too conjectural."[15] The court held that the Board's findings, which simply stated " '[t]hat Plaintiff is not permanently totally disabled within the definition set forth in the opinion of the Court of Appeals,' " would be inadequate for review.[16] This inadequacy was cured in the second hearing, however, by a recitation of medical testimony under the heading "Summary of Evidence" which concluded with a statement by the Board that the evidence indicated that "Plaintiff is capable of pursuing many normal kinds of occupations. He has permanent partial impairment, but not a permanent total disability."[17] The court ruled that the placement of this "finding" under "Statement of Evidence" was only a defect in form, for which reversal would be inappropriate.[18]

Judge Staton dissented.[19] He argued that the Board's findings were insufficiently specific and therefore substantively defective

---

[10]*Id.* at 865.

[11]*Id.* (emphasis in original).

[12]Perez v. United States Steel Corp., 172 Ind. App. 242, 248, 359 N.E.2d 925, 929 (1977).

[13]*Id.* at 249, 359 N.E.2d at 929.

[14]416 N.E.2d at 865.

[15]*Id.* (citations omitted).

[16]*Id.* (quoting the findings of the Industrial Board in its second *Perez* hearing).

[17]416 N.E.2d at 865-66.

[18]*Id.* at 866 (citing IND. R. APP. P. 15(E)).

[19]416 N.E.2d at 866-67 (Staton, J., dissenting).

because the Board had merely provided the court "with a smorgasbord of medical testimony from which it could select a possible factual foundation for the Board's conclusion that Perez was 'capable of pursuing many normal kinds of occupations.' "[20]

Even if the findings of the Board were sufficient for purposes of appellate review, the dissent continued, the negative award in *Perez* was contrary to law because the Board failed to exclude "*every* possibility of recovery."[21] To maintain a claim for total permanent disability " '[i]t is sufficient if the workman can show that he has been so incapacitated by his injuries that *he cannot carry on reasonable types of employments*. The reasonableness of the workman's opportunities will be measured by his physical and mental fitness for them and by their availability.' "[22] The dissent noted that the "measure of the claimant's disability is not limited to a medical evaluation of the claimant's physical impairment or anatomical dysfunction . . . . Other nonmedical factors, such as the claimant's age, education, training, skills, and job opportunities, must be weighed by the Board when the claimant presents evidence on such factors."[23] The Board could not properly have denied Perez's disability claim because it "failed to make specific findings of fact on the nonmedical evidence presented" by manual laborer Perez regarding his seventh grade education, lack of vocational skills, and the refusal of his former employer to re-employ.[24] "[O]nce the claimant presents evidence which may provide a factual foundation for a total disability claim, the Board must execute its statutory duty to weigh that evidence and make findings of fact consistent with its ultimate disposition of the claim."[25]

In concluding his persuasive dissent, Judge Staton admonished the Board for their uncritical adoption of the employer's "Proposed Findings of Fact,"[26] and noted that findings of fact "are the polestar for our judicial review. Without them, this Court wanders aimlessly through the record in search of a factual foundation for the awards . . . . [T]he Board should seize upon every opportunity to make specific findings of fact so that it ensures limited judicial review."[27]

2. *Continuation of Medical Care and Payments.*—In *Talas v. Correct Piping Co.*,[28] a work related injury reduced Woodrow Talas

---

[20]*Id.* at 867.

[21]*Id.* (emphasis in original).

[22]*Id.* at 868 (quoting B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 9.4, at 244 (1950) (emphasis in original)).

[23]416 N.E.2d at 868.

[24]*Id.*

[25]*Id.* at 870.

[26]*Id.*

[27]*Id.*

[28]409 N.E.2d 1223 (Ind. Ct. App. 1980), *vacated*, 416 N.E.2d 845 (Ind. 1981).

to a traumatic quadriplegic. From January 19 to June 16, 1979, he received around-the-clock nursing care at his home. The cost of this care was paid for by the employer's insurance carrier until May 13. After June 16, however, his home nursing care was reduced to maintenance care provided by a nurse's aid for eight hours per day and a bi-weekly visit by a licensed practical nurse. Talas testified that under the around-the-clock care "his physical feelings and motions began to improve," but under the reduced care, "his joints [were] getting stiffer and [he was] not able to function as well as before."[29]

Talas and Correct Piping executed a Form 12 agreement which provided that "compensation was 'based upon 100% permanent impairment of the man as a whole and 100% total permanent disability.' "[30] The agreement further provided that (1) Talas' injury was " 'in a permanent and quiescent state,' " and (2) that continuing treatment " 'including . . . nursing services and supplies, has not been agreed upon' " and would be determined at a hearing of the Board.[31] The Board approved this agreement on April 6, 1979.[32]

A single hearing member on December 21, 1979 ruled on Talas' "emergency petition for a hearing to determine Correct's liability for nursing care needed to sustain his life" and ordered Correct "to pay and continue to pay 'all the medical and nursing care needed by plaintiff . . . in order to reduce his disability or impairment.' "[33] On review, the Board overruled this order and directed Talas to "take nothing by way of the petition."[34]

Talas argued on appeal that for purposes of medical payments, his injury was not permanent and quiescent, and that further, he had never agreed to any provision regarding either the continuation or the reduction of his nursing care.[35] Talas also argued that medical payments for nursing care were appropriate under any one of four payment periods provided for in the Act.[36] Talas concluded his arguments by contending that the Board's findings were insufficient for purposes of appellate review.[37]

The court of appeals affirmed the Board's determination and held there was sufficient evidence in the record to support the Board's decision that Talas' injury "had reached a permanent and

---

[29]409 N.E.2d at 1225.

[30]*Id.*

[31]*Id.* at 1225-26 (quoting Form 12 agreement between Talas and Correct Piping).

[32]*Id.* at 1225.

[33]*Id.* at 1226.

[34]*Id.*

[35]*Id.*

[36]*Id. See* note 40 *infra.*

[37]409 N.E.2d at 1226.

quiescent state for the purposes of medical payments."[38] Although Talas had not agreed to a nursing care settlement, the court ruled that the parties had agreed that the question was subject to the Board's determination at a hearing which in fact had been held and which had consummated in the employer's favor.[39] In reviewing the four possible statutory periods during which medical payments could be awarded,[40] the court noted that there was only one possibility applicable to this case, that is, the time " '[a]fter an employee's injury has been adjudicated by agreement or award on the basis of permanent partial impairment . . . as necessary to reduce the amount and extent of such impairment.' "[41] The court concluded, however, that whether any improvement was possible was a question of fact and that the Board must have determined that there was no care available to reduce Talas' 100% impairment.[42] The court agreed that while "[t]he findings of the Board are at best minimally adequate due to the circumstances of the case, the record before this court, and the standard for appellate review, the findings are sufficient to allow us to review the Board's determination."[43]

The Indiana Supreme Court disagreed.[44] It accepted transfer and vacated the opinion of the court of appeals.[45] The supreme court reasoned that because the Board had reversed the order of the single hearing member, it was even more important that the Board "set out written findings of fact in support of [its] decision so that an appellate court may intelligently review the decision without speculating as to the agency's reasoning."[46] This defect was not cured by

---

[38]*Id.* at 1227.

[39]*Id.*

[40]The court noted that:

IND. CODE 22-3-3-4 provides payment for medical, surgical, hospital and nursing services at four different times:

(1) After an injury and prior to an adjudication of permanent injury
(2) During the period of temporary total disability resulting from the injury
(3) After an employee's injury has been adjudicated by agreement or award on the basis of permanent partial impairment . . . as necessary to reduce the amount and extent of such impairment, and;
(4) In an emergency or because of the employer's failure to provide attending physician.

409 N.E.2d at 1227 (quoting IND. CODE § 22-3-3-4 (Supp. 1981)).

[41]*Id.*

[42]*Id.* at 1228.

[43]*Id.*

[44]416 N.E.2d 845 (Ind. 1981) *vacating* 409 N.E.2d 1223 (Ind. Ct. App. 1980.

[45]*Id.* at 846.

[46]*Id.*

simply including the hearing officer's order in the Board's order because the officer's order did not include his findings.[47] Further, the Board had reversed the determination of the hearing officer and "therefore it was necessary for the Board to explain its reasons for reversal."[48] The cause was remanded "to the Industrial Board with instructions to make specific findings of fact" which would support an ultimate finding of fact.[49]

B. *Exclusiveness of Remedy*

1. Employer's Violation of Safety Statutes.—The plaintiff in *Cunningham v. Aluminum Co. of America*,[50] argued that his employer's violations of safety statutes which allegedly resulted in the claimant's severe injuries, should permit him to bring a direct action for compensatory and punitive damages against his employer notwithstanding the exclusive remedy provision of the Indiana Workmen's Compensation Act.[51] Cunningham believed that the exclusive remedy provision only applied when an employee is injured as a result of an industrial accident. When an employer intentionally maintains an unsafe workplace, however, any resultant injuries are not accidents but are intentional torts which fall outside the purview of the Act. Cunningham reasoned that an employer who intentionally maintains an unsafe workplace must expect injuries and that such injuries must therefore be considered to have been intentionally caused.[52]

The court rejected this reasoning, first questioning the appellant's concept of intent by citing Dean Prosser who has stated that " '[t]he mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent.' "[53] Second, the court characterized Cunningham's injury as an accident clearly within the Act, based on its analysis of two earlier Indiana cases in which the claimants alleged that the employers could have anticipated the

---

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] 417 N.E.2d 1186 (Ind. Ct. App. 1981).

[51] *Id.* at 1188-89. IND. CODE § 22-3-2-6 (1976) states in part:

> The rights and remedies herein granted to an employee subject to this act on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of injury or death.

Id.

[52] 417 N.E.2d at 1189.

[53] *Id.* at 1190 (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS 32 (4th ed. 1971)).

workplace injuries.[54] In those earlier cases, "accident" was defined for the purposes of the Act as " 'an unlooked for mishap, an untoward event which is not expected or designed' "[55] and " 'any mishap or untoward event not expected and which was not designed *by the one who suffered the injury or death.*' "[56] These definitions, however, rest upon the expectations of the employee and not the employer.

The court finally held, again based on precedent, that an employer's violation of a safety statute did not remove Cunningham's injury from the class covered by the Act's exclusive remedy provision.[57] The court cited one case which held that the mere violation of the Federal Employer's Liabililty Act "did not take the cause out of the classification of workmens' compensation cases,"[58] and another case in which the intentional attack by a supervisor on another employee was governed by the Act when the attack arose " 'out of and in the course of employment.' "[59] In yet another case cited by the court, a diversity opinion decided under Indiana law, it was held "that the employee's remedy under the Act was 'exclusive regardless of the [employee's] allegation that the cause of his injury was willful and reckless violation of the statutes . . . . ' "[60]

Cunningham had also mounted an equal protection attack upon that provision of the Act which denies an employee compensation when the employee's injury or death is due to any one of a series of intentional or willful acts of misconduct by the employee,[61] but fails to deny the "benefits" of the Act to an employer who engages in intentional conduct of perhaps equal intensity.[62] Cunningham argued that this disparate treatment of "employers and employees under the Act bears no reasonable relation to a legitimate state objective . . . ."[63]

The court rejected this argument, noting that the historical bargain which gave rise to workers' compensation laws, whereby cer-

---

[54]417 N.E.2d at 1190.

[55]*Id.* (quoting Pearson v. Rogers Galvaniz. Co., 115 Ind. App. 426, 428, 59 N.E.2d 364, 365 (1945)).

[56]*Id.* at 1190 (emphasis in original)(quoting Furst Ferber Cut Stone Co. v. Mayo, 82 Ind. App. 363, 365, 144 N.E. 857, 857 (1925)).

[57]417 N.E.2d at 1190.

[58]*Id.* (citing Harshman v. Union City Body Co., 105 Ind. App. 36, 13 N.E.2d 353 (1938)).

[59]*Id.* at 1191 (quoting Burkhart v. Wells Elecs. Corp., 139 Ind. App. 658, 662, 215 N.E.2d 879, 881 (1966)).

[60]*Id.* at 1191 (quoting North v. United States Steel Corp., 495 F.2d 810, 811-12 (7th Cir. 1974)).

[61]IND. CODE § 22-3-2-8 (1976) (current version at *Id.* § 22-3-2-8 (Supp. 1981)).

[62]417 N.E.2d at 1191-92.

[63]*Id.* at 1192.

tainty, speed, and freedom from devastating defenses were given to the employee in exchange for his accepting certain limitations on his remedies not provided for in tort law,[64] did indeed meet the legitimate state objective test of an equal protection analysis by improving what was formerly "a highly unsatisfactory remedy" under the common law.[65] In any event, however, to state a cognizable equal protection claim, the plaintiff must show that he was not treated alike by the law with respect to "all persons similarly circumstanced."[66] For purposes of equal protection comparison, employers and employees are clearly not similarly circumstanced, and "Cunningham has nowhere alleged that the Act in its operation treats him any differently than any other employee."[67]

Perhaps it should also be emphasized that the great historical tradeoff of workers' compensation was designed to produce a rough equivalency—the injured worker received a certain but limited benefit, and the employer paid for all accidental injuries arising out of and in the course of employment, without an inquiry into either the employer's or the employee's negligence. While this equation was once recognized by both labor and business as representing an equitable bargain into which the denial of a worker's claim for intentional misconduct could reasonably be factored without seriously tipping the scales in favor of employers, the recent failure of the Indiana legislature to keep pace with economic realities by adequately adjusting benefit schedules may have damaged that perception of equivalency in Indiana.[68]

---

[64]Contributory negligence, assumption of risk, and the fellow servant rule. *Id.*

[65]*Id.*

[66]*Id.*

[67]*Id.*

[68]The amount of the award under the Indiana Workmen's Compensastion Act codified at IND. CODE §§ 22-3-1-1 to -10-3 (1976 & Supp. 1981) is a function of several variables such as the classification of the impairment (whether total or partial, temporary or permanent), the nature of the loss (medical expenses, lost wages, or a physical impairment which is linked by statutory formula to lost wages), and the worker's former earning level. The variables are then subject to a system of statutory ceilings. With respect to an injury occurring after July 1, 1979, an injured employee can receive compensation for medical expenses during the period of temporary total disability. *Id.* § 22-3-3-4 (Supp. 1981). During the period of temporary total disability he can receive up to 500 weeks of compensation for lost earnings at 66⅔% of his average weekly wage, *id.* § 22-3-3-8, not to exceed $140 per week of such compensation, *id.* § 22-3-3-22. If he has been permanently impaired he can receive an additional award of weekly compensation at 60% of his weekly compensation according to the statutory schedule. *Id.* § 22-3-310(a)(1). Impairment awards are reduced, however, by temporary total disability payments in excess of fifty-two weeks. *Id.* Total compensation exclusive of medical benefits under any provision or combination of provisions of the law is limited to $70,000. *Id.* § 22-3-3-22(g).

The Interagency Task Force on Products Liability stated:

In states that have not raised Worker Compensation benefits to the National

2. Dual Capacity Doctrine.—Although injured workers must generally remain content with the exclusive remedy provided by workers' compensation, they or their subrogees are free to pursue tort actions against third parties whose tortious acts may have been the sole or concurrent proximate causes of their injuries. Indeed, nearly half of the national payout for product liability claims is extracted from manufacturers of workplace products to compensate injured workers.[69]

Frequently, employers of the injured workers or subsidiaries of the employer are also the manufacturers of the product causing the injury. In these cases, workers argue that they should be permitted to maintain direct actions against their employers who have caused injury in their capacity of product manufacturers.[70] Why, the workers argue, should a suit against a third party manufacturer be permitted to go forward but be barred when the identical tort is committed by their employer? The response to the workers' argument is that the employer is a legal entity which has bargained away tort defenses in exchange for the immunization from direct suit which it enjoys under the exclusivity of the workers' compensation remedy. Permitting tort actions against the employer would destroy the balance for which the employer bargained.

While Indiana[71] and most other states[72] which have considered

---

> Commission's [Commission on State Workmen's Compensation Laws] recommendation of 66⅔ [per cent of] previous income up to 100 per cent of the state's weekly wage, it might be fair and reasonable to cut off a worker's right to sue manufacturers of products in exchange for a higher Worker Compensation payment benefit.

U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT VII-104 (1978). Indiana's average weekly wage for accidents occurring after July 1, 1980 is $210. *See* IND. CODE § 22-3-2-22(a) (Supp. 1981). Under the National Commission's formulation, an injured workman earning more than $314.84 would thus receive $210 per week, as opposed to the Indiana formulation which cuts off the maximum award at $140 per week ($210 x 66⅔%).

[69]INSURANCE SERVICES OFFICE, PRODUCT LIABILITY CLOSED CLAIM SURVEY: A TECHNICAL ANALYSIS OF SURVEY RESULTS 62 (1977).

[70]*See generally* Mitchell, *Products Liability, Workmen's Compensation and the Industrial Accident*, 14 DUQ. L. REV. 349, 357-61 (1976); Utken, *Workmen's Compensation, 1978 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 340-42 (1978); Note, *Dual Capacity Doctrine: Third-Party Liability of Employer-Manufacturer in Products Liability Litigation*, 12 IND. L. REV. 553 (1979); Comment, *Workmen's Compensation and Employer Suability: The Dual Capacity Doctrine*, 5 ST. MARY'S L.J. 818 (1974).

[71]*See* notes 74-77 *infra* and accompanying text.

[72]*See, e.g.*, Billy v. Consolidated Mach. Tool Corp., 51 N.Y.2d 152, 412 N.E.2d 93, 432 N.Y.S.2d 879 (1980) (rejecting plaintiff's dual capacity argument, but permitting recovery because corporate employer had absorbed maker of hazardous machine through merger); Longever v. Revere Copper and Brass, Inc., 80 Mass. Adv. Sh. 1767, 408 N.E.2d 857 (1980). For additional case authorities, *see* Utken, *supra* note 70, at 342 n.7.

the question have rejected the dual capacity doctrine, several jurisdictions have begun to recognize this concept.[73] Although this response is in part based upon perceptions that workers' compensation is no longer providing adequate benefits, the increasing recognition of dual capacity can more likely be traced to the growth of corporate conglomerates. When injury is caused by products which are sold by wholly owned subsidiaries of the employer and which are totally unrelated to the products manufactured, or the services provided, by the division or subsidiary in which the injured employee works, the argument for recognizing a true dual capacity of the employer is clearly enhanced. The giant holding companies of the late twentieth century were not comtemplated by the architects of the workers' compensation system when the bargain between employer and employee was struck in the early part of that century.

The Indiana position on the dual capacity doctrine was discussed during the survey period in *Jackson v. Gibson.*[74] The court noted that the doctrine had initially been rejected by the Seventh Circuit Court of Appeals in *Kottis v. United States Steel Corp.*,[75] a diversity case decided under Indiana law. The reasoning of that case, in which it was held that the doctrine "was not consistent with the statute 'which abrogates' all other rights and remedies . . . at common law or otherwise on account of such injury or death except those against 'some other person than the employer not in the same employ,' "[76] was later held dispositive in *Needham v. Fred's Frozen Foods, Inc.*[77]

In *Jackson*, however, the plaintiff sought to bring his direct action against Gibson, the president of his employer, Sun Realty, not in any dual capacity as his employer but against Gibson as a separate "entity."[78] Gibson was also the owner of the real property upon which the plaintiff was injured, prompting the plaintiff to bring his action against Gibson as landowner.[79]

The court rejected the plaintiff's theory after employing the following two step analysis derived from *Witherspoon v. Salm.*[80]

---

[73]*See, e.g.*, Moreno v. Leslie's Pool Mart, 110 Cal. App. 3d 179, 167 Cal. Rptr. 747 (1980); Knous v. Ridge Machine Co., 64 Ohio App. 2d 251, 413 N.E.2d 1218 (1979); *cf.* Kohi v. Raybestos-Manhattan Inc., 505 F. Supp. 159 (E.D. Pa. 1981) (predicting that Pennyslvania state courts would follow a dual capacity doctrine).

[74]409 N.E.2d 1236 (Ind. Ct. App. 1980), *transfer denied*, Feb. 2, 1981.

[75]543 F.2d 22 (7th Cir. 1976).

[76]409 N.E.2d at 1237-38 (quoting 543 F.2d at 24).

[77]179 Ind. App. 671, 359 N.E.2d 544 (1977), *discussed in* Utken, *supra* note 70, at 340-42.

[78]409 N.E.2d at 1238.

[79]*Id.*

[80]251 Ind. 575, 243 N.E.2d 876 (1969).

Under *Witherspoon*, a court must first determine whether the plaintiff's injury arose out of or in the course of his employment.[81] If as in *Jackson* it did,[82] the next step is to determine whether the defendant was within the class of persons made immune to direct suit by Indiana Code section 22-3-2-5 of the Act which states that the "employer . . . or those conducting his business . . . shall be liable only to the extent and in the manner herein specified."[83] The court in *Jackson* held that defendant Gibson, "president of Sun Realty, Inc. was supervising or directing the work of Jackson, an employee of the corporation . . . . [A] president-manager-director is within the group of persons conducting the business of the employer, the corporation."[84]

It would appear that under the court's analysis, a person cannot simultaneously be more than one legal entity for *purposes of the Act*.[85] If the injury arises in the course of employment, a natural person will either be held to be within the immune class of employers and persons doing his business, or he will be held to be outside that class. The court noted, however, that "[h]ad the landowner been someone other than Gibson and a stranger to the employment, there is no question that these provisions [IND. CODE §§ 22-3-2-5, -13] would not foreclose the bringing of a suit."[86] It should be emphasized that under the court's analysis, Gibson would be immune from direct suit even though the injury-causing instrumentality were shown to be some hazardous condition of premises not owned, operated, or controlled by Sun Realty, the employer. Employers probably should not be overly sanguine that their immunity to direct suits in these situations will be permitted to continue indefinitely in Indiana without limitation.

3. Retaliatory Discharge.—In 1973, in *Frampton v. Central Indiana Gas Co.*,[87] the Indiana Supreme Court ruled that an employee who alleged that he was discharged for filing a workers' compensation

---

[81]*Id.* at 576, 243 N.E.2d at 877. "At the time of the collision appellant was within the scope of her employment and her injuries arose out of and during the course of her employment . . . ." *Id.*

[82]409 N.E.2d at 1236-37. "Duane Jackson was employed by Sun Realty Company, Inc. as a custodian. He was injured while performing his duties as custodian at a building owned by Earl Gibson." *Id.*

[83]IND. CODE § 22-3-2-5 (1976).

[84]409 N.E.2d at 1238.

[85]Alternatively, if the existence of more than one legal entity is recognized as residing in a single person, and if one of those entities has been established as the employer of the claimant, all other entities become immune to direct suit by the claimant when injury is incurred out of and in the course of employment.

[86]409 N.E.2d at 1239 n.1.

[87]260 Ind. 249, 297 N.E.2d 425 (1973).

claim, had stated a cognizable claim upon which relief could be granted.[88] In *Scott v. Union Tank Car Co.*,[89] the Indiana Court of Appeals was asked to determine whether such a claim sounded in contract or tort for purposes of establishing which statute of limitations applied to the action.

Scott, an employee at will who had brought his action more than two years after he was discharged, argued his claim arose out of a contractual relation and was therefore governed by the six year statute of limitations which applies to contracts not in writing.[90] The court of appeals ruled, however, that retaliatory discharge is an act of an employer " 'intended to cause an invasion of an interest legally protected from intentional invasion' "[91] and therefore sounds in tort. "The fact that the right invaded is one which the law has created 'in consequence of a relation which a contract has established between the parties' in no way undermines, but in fact supports that conclusion."[92] Scott's claim was thus barred by the two year limitation provided by section 34-1-2-2.[93]

Judge Staton dissented, arguing that a retaliatory discharge can be more properly characterized as a breach of the employment contract.[94] He acknowledged that employment at will in Indiana provides no express promise to retain an employee beyond a period determined by the will of either party, but also quoted the *Frampton* court which held that " 'in exercising a statutorily conferred right an exception to the general rule must be recognized.' "[95] The dissent further noted that when workers' compensation was voluntary in Indiana,[96] it was firmly established that the rights and obligations of the act were " 'contractual in nature.' "[97] Even though that coverage is now compulsory, the dissent argued that the relationship still bears contractual characteristics.[98]

In support of this reasoning, the dissent first pointed to the extra-jurisdictional reach of the state's power to regulate performance of workers' compensation duties which is similar to the power

---

[88]*Id.* at 253, 297 N.E.2d at 428.

[89]402 N.E.2d 992 (Ind. Ct. App. 1980).

[90]IND. CODE § 34-1-2-1 (1976).

[91]402 N.E.2d at 993 (quoting RESTATEMENT (SECOND) OF TORTS § 6, Comment a (1965)).

[92]402 N.E.2d at 993. *See* Peru Heating Co. v. Lenhart, 48 Ind. App. 319, 326, 95 N.E. 680, 683 (1911).

[93]IND. CODE § 34-1-2-2 (1976).

[94]402 N.E.2d at 993 (Staton, J., dissenting).

[95]*Id.* at 995 (quoting 260 Ind. at 253, 297 N.E.2d at 428).

[96]Act of Mar. 14, 1929, ch. 172, § 2, 1929 Ind. Acts 536 (current version at IND. CODE § 22-3-2-2 (1976)).

[97]402 N.E.2d at 995.

[98]*Id.* at 996.

given to the state to regulate performance of contracts outside the state which were formed within the state.[99] However, a state does not have the power to control the "legal consequences of a tortious act committed outside the state . . . . "[100] Therefore, "if the rights and obligations imposed on employment agreements by the . . . Act are applicable to injuries sustained by an employee in another jurisdiction then those rights and obligations must be contractual in nature."[101] The dissent further argued that the remedies under the Act are not based on fault, a tort concept, but are triggered by an inquiry regarding whether an injury was incidental to the contractual employment relationship. Thus, the employer's duty to compensate under the Act is a contractual one incidental to the employment relationship.[102]

While the dissent also pointed to the various reciprocal duties of employer and employee under the Act to illustrate the presence of contractual characteristics such as consideration and mutuality,[103] the most persuasive argument mounted by the dissent, however, invoked the policy followed "with apparent unanimity" in other jurisdictions.[104] This policy holds "that when a question arises with respect to which of two applicable statutes of limitations should govern a particular cause of action, the doubt should be resolved in favor of the theory containing the longer period of limitation."[105]

In support of the majority position, it can be argued that six years is really too long a period in which to permit a suit for wrongful discharge on any ground. The dissent observed, however, that the legislature in 1977 had enacted a two year statute of limitations to govern oral employment agreements—a statute which would now govern disputes similiar to *Scott*.[106] To permit Scott to maintain his action, which accrued before enactment of the 1977 statute under a contract theory, would set no far-reaching precedent for other employment cases.

In another area of Indiana law, however, precedent does appear to give the choice to plaintiff if his claim contains the essential elements of either theory. In Indiana, a claim for breach of implied warranty can be brought sounding in contract if the various Uniform Commercial Code requirements are met, or can sound in tort if

---

[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.* at 997.
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.* (citing IND. CODE § 34-1-2-1.5 (Supp. 1981)).

personal injury or property damage is alleged.[107] If the essential elements are present, the applicable statute of limitations will thus be determined by the plaintiff's choice of theory. There seems little compelling reason for absolutely characterizing all retaliatory discharge actions as either sounding in contract or tort. The claim would seem to allow for an election of theories and remedies, or the theories might be pleaded alternatively in separate counts.

4. Date of Accrual; Time of Exposure vs. Time of Disability.— Occupational diseases frequently take years to develop before the worker becomes disabled. In *Bunker v. National Gypsum Co.*,[108] the plaintiff was exposed to asbestos during 1949-1950 but did not become disabled by asbestosis until some time after 1963. Bunker sought to maintain a common law action for negligence against his employer, arguing that the Act was not his exclusive remedy because his cause of action accrued in 1949-1950 when he was exposed to asbestos and not when he was disabled. In 1950 neither he nor his employer was covered by the Indiana Occupational Disease Act which then required affirmative acceptance by the employer before its employees would be covered.[109] The Act was amended in 1963, however, to provide that coverage was automatic unless an employee voluntarily exempted himself from the Act.[110] The question presented to the court was which version of the Act controlled: the Act at the date of exposure or the Act as it existed at the time of disablement.[111]

The court first noted the general rule that "[t]he act has at all times granted compensation on account of *disablement or death*. . . .

---

[107]*See* Amermac, Inc. v. Gordon, 394 N.E.2d 946, 948 n.4 (Ind. Ct. App. 1979); Fruehauf Trailer Div. v. Thornton, 366 N.E.2d 21, 27 (Ind. Ct. App. 1977) ("In Indiana, an action for breach of warranty may be either in contract or tort, depending on the allegations of the complaint."); *cf.* Reid v. Volkswagen of America, Inc., 512 F.2d 1294, 1296 (6th Cir. 1975) (includes Indiana among states which apply Uniform Commerical Code limitation where privity of contract has been alleged, but apply the tort limitation where it has not); *see also* Vargo & Leibman, *Products Liability, 1979 Survey of Recent Developents in Indiana Law*, 12 IND. L. REV. 227, 240-41 (1979).

[108]406 N.E.2d 1239 (Ind. Ct. App. 1980).

[109]As originally enacted in 1937 the relevant provision stated: "(a) Where an employee in this state dies or sustains injury to health, by reason of disease contracted . . . in the course of employment . . . , unless such employer shall have elected to provide and pay compensation as provided in section 4 of this act, a right of action shall accrue to the employee . . . ." Act of Mar. 6, 1937, ch. 69, § 3, 1937 Ind. Acts 334 (1937) (current version at IND. CODE § 22-3-7-3 (1976)).

[110]Act of Mar. 15, 1963, ch. 338, § 1, 1963 Ind. Acts 1044, 1045 (1963). The 1963 act originally created a presumption that employers and employees were covered by the act and were bound "respectively, to pay and accept compensation" unless the employee gave notice to the contrary prior to any disablement or death. *Id.* In 1974, this presumption was abolished and mandatory compliance with stated exceptions was substituted therein. Act of Feb. 21, 1974, Pub. L. No. 109, § 1, 1974 Ind. Acts 414 (1974) (codified at IND. CODE § 22-3-7-2 (1976)).

[111]406 N.E.2d at 1240.

No employee has a remedy under the act unless or until the occupational disease causes death or disablement."[112] Because the Occupational Disease Act provided that coverage would be automatic unless the employee voluntarily exempted himself, the court held that the plaintiff's action accrued after 1963, and was therefore governed by the exclusive remedy of the Act.[113] The effect of this ruling was to bar the plaintiff altogether because the Indiana Occupational Disease Act's statute of limitations regarding asbestosis provides that disability must occur within three years of the employee's last exposure to asbestos.[114]

Bunker had also challenged this provision on equal protection grounds, but the court declined to reach the constitutional question, ruling that it was not properly before the court in plaintiff's appeal from the trial court's dismissal which had only found "that Bunker's exclusive remedy was provided by the act."[115] The plaintiff's constitutional challenge was grounded on the theory that other plaintiffs' who expressly come under this statute, and impliedly under other statutes of limitation, would have the benefit of a limitation period which would run from the date those plaintiffs *discovered or might have ascertained* that they had suffered an injury and damages, rather than from the date of their exposure to a toxin.[116]

---

[112]*Id.* at 1241 (emphasis in original).

[113]*Id.*

[114]IND. CODE § 22-3-7-9(f) (Supp. 1981).

[115]406 N.E.2d at 1240 n.1. Following the close of the Survey period, the court of appeals held in a companion case, after reviewing medical research regarding the nature of asbestosis which was unavailable unitl several years after the law was passed in 1937, that the three-year statute of limitations was unconstitutional. Bunker v. National Gypsum Co., 426 N.E.2d 422 (Ind. Ct. App. 1981) (2-1 decision) (Hoffman, J., dissenting).

[116]Brief for Appellant at 20-23. *See, e.g.*, IND. CODE § 22-3-7-9(f) (Supp. 1981) which, while providing for a three year limitation from date of last exposure to the hazards of diseases caused by inhalation of silica dust, coal dust, or asbestos, also provides:

> However, in all cases of occupational disease caused by the exposure to radiation, no compensation shall be payable unless disablement . . . , occurs within two (2) years from the date on which the employee had knowledge of the nature of his occupational disease or, by exercise of reasonable diligence, should have known of the existence of such disease and its causal relationship to his employment.

A distinct line of cases has held that under Indiana law, a tort cause of action accrues upon the concurrence of injury and "damages . . . '*susceptible of ascertainment.*' " Withers v. Sterling Drug, Inc., 319 F. Supp. 878, 880 (S.D. Ind. 1970) (emphasis in original) (quoting Gahimer v. Virginia-Carolina Chem. Corp., 241 F.2d 836, 840 (7th Cir. 1957); *see also* Montgomery v. Crum, 199 Ind. 660, 679, 161 N.E. 251, 259 (Ind. 1928); Scates v. State, 383 N.E.2d 491, 493 (Ind. Ct. App. 1978). However, the validity of this rule was placed in question by a recent Indiana Supreme Court decision.

In Shideler v. Dwyer, 417 N.E.2d 281 (Ind. 1981), a legal malpractice action arising out of a negligently drawn will, the court examined when a cause of action accrued for

An interesting question is presented within the context of the *Bunker* case if in fact the statute of limitations governing a common law action for negligence occurring in 1949-1950 was interpreted as beginning to run only when plaintiff would or should have as-certained or discovered his damages. Would Bunker's common law action have accrued at the moment of discovery, or would it have accrued at the time the undiscovered injury commenced, but be tolled until the moment Bunker discovered his illness as would be the rule in the case of fraudulent concealment?[117] If the latter view were adopted, Bunker's common law action for negligence would have accrued in 1949-1950 when presumably his progressive injury began, but would have been tolled until Bunker discovered, or should have discovered, that he had contracted asbestosis. His common law action would then have survived the 1963 amendment to the Occupational Disease Act. It can be persuasively argued, however, that tolling should only occur when the defendant's scienter can be proved. Bunker does not appear to have alleged any fraudulent concealment on the part of his employer, and while it might be inferred that Bunker's claim of negligence against National Gypsum implies that National Gypsum is alleged to have had actual or imputed knowledge of the harmful propensities of asbestos, there is no confidential or fiduciary relationship between Bunker and National Gypsum

---

legal malpractice. The court ruled that the statute had begun to run, and the cause of action had accrued upon, the death of the testator, rather than at the time the probate court ruled adversely to the plaintiff. *Id.* at 290. This holding was broadly based on the policy that approves the repose characteristics of statutes of limitation. *Id.* at 291. The rule set down in *Shideler* would therefore be expected to govern all such statutes where the legislature has not provided for some variant. The *Shideler* rule also denies the concept of discovery, that is, the statute begins to run at the onset of damages even if damages are not *yet ascertainable*. *Id.* Damages were held to have occurred in *Shideler* even before the probate court had ruled that a legal injury had in fact occurred. *See generally* MacGill, *Shideler v. Dwyer: The Beginning of Protective Legal Malpractice Actions*, 14 IND. L. REV. 927 (1981) for a detailed appraisal of *Shideler*.

Applied to the *Bunker* case, the *Shideler* rule would result in the plaintiff's common law action accruing at the time his undiscovered disease began. The *Shideler* court quoted a New York case, Schmidt v. Merchants Dispatch Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936), in which the plaintiff's cause of action accrued when he inhaled the dust and not when this dust resulted in disease. 270 N.Y. at 300-01, 200 N.E. at 827, *quoted in* 417 N.E.2d at 289-90. But even under *Shideler*, accrual would probably not be established that early. If a disease failed to develop, no cause of action would ever accrue. *Shideler* does not hold that the accrual of a plaintiff's action should relate back to the moment of defendant's act upon the later ripening of that act into injury. If Bunker's asbestosis had commenced prior to the 1963 amendment, his common law action against National Gypsum would have accrued at that time, and under *Shideler*, would have run out two years later absent fraudulent concealment.

[117]*See, e.g.*, French v. Hickman Moving & Storage, 400 N.E.2d 1384, 1398 (Ind. Ct. App. 1980) (alleged fraudulent concealment of conversion); Cordial v. Grimm, 169 Ind. App. 58, 68, 346 N.E.2d 266, 272 (1976) (alleged legal malpractice).

as would give rise to a duty requiring National Gypsum under a fraud theory to disclose those propensities.[118]

5. *The Effect of Other Compensation Statutes.*—State workers' compensation statutes may not govern compensation for some workplace accidents. In *Garvey Grain Co. v. Director, Office of Workers' Compensation Programs*,[119] the claimant, Max Cuellar, sought compensation under the Longshoremen's and Harbor Worker's Compensation Act.[120] The Administrative Law Judge and the Benefits Review Board both found that Cuellar was an employee within the Act and was therefore entitled to temporary total disability.[121] On appeal, the employer, Garvey Grain, raised, *inter alia*, two issues: (1) "whether Cuellar was an employee within the meaning of the Act" and (2) whether the accident occurred "on navigable water of the United States" as to meet the situs jurisdictional requirement of the Act.[122]

Cuellar was a millwright who was injured while "repairing or reconditioning screw conveyors in a portion of the [Garvey] mill where grain products were made into pellets to be stored . . . until the owner of the product determined to whom the pellets would be shipped."[123] The Administrative Law Judge determined that Cuellar, whose duties also included repairing equipment on the barges and ships which docked beside the plant, was engaged in "maritime employment" although at other times, such as at the time of injury, his duties might reasonably fall outside that classification.[124]

The Seventh Circuit Court of Appeals affirmed this finding, pointing out that "[t]he 'moment of injury' test is no longer the test to determine the status of an employee under the Act."[125] The court cited *Northeast Marine Terminal Co. v. Caputo*,[126] a United States Supreme Court case which held that "a workman is covered [under the Act] if he spends at least *some of his time* in indisputably longshoring operations."[127] The court concluded that it would not set aside the Benefit Review Board's finding if the award "is supported by substantial evidence on the record, considered as a whole, and so long as there is a reasonable legal basis for the Board's conclusion."[128] The court also noted that "[in] deciding this appeal, the Act

---

[118]*See* 400 N.E.2d at 1389.
[119]639 F.2d 366 (7th Cir. 1981).
[120]33 U.S.C. § 901-50 (1976 & Supp. III 1979).
[121]639 F.2d at 368-69.
[122]*Id.*
[123]*Id.*
[124]*Id.* at 370.
[125]*Id.* at 371.
[126]432 U.S. 249 (1977).
[127]639 F.2d at 371 (emphasis added).
[128]*Id.* at 369.

is to be liberally construed in favor of injured workers . . . ."[129] The court's conclusion was that "Cuellar was engaged in 'maritime employment' by virtue of the work he did in performing his overall duties for his employer . . . ."[130] The court also upheld the Administrative Law Judge's finding that Cuellar's injury met the situs requirement of the statute.[131] Although Cuellar was working well within the pellet making plant, "[n]avigable waters include an adjoining area customarily used by the employer in loading, unloading, repairing or building a vessel."[132]

This case suggests that an employee whose duties include some functions common to other workers who are covered by a compensation statute more liberal than the applicable state compensation law, may be able to secure the protection of the more liberal statute even though that employee was performing other functions at the time of injury, and in a place somewhat removed from the situs normally associated with the coverage of the more liberal statute. Employers and their compensation insurance carriers would be well advised to review the status and job-sites of workers potentially subject to such alternate coverage.

C. Progressive and Recurrent Injuries

1. Notice to Employer and Effective Date.—Bogdon v. Ramada Inn Inc.,[133] presented a fact pattern which frequently results in workers' compensation litigation. Frank Bogdon suffered a back injury in January, 1977, but continued to work with some discomfort until March 31, when severe pain forced him to obtain surgery for a herniated disc. Bogdon had orally advised his manager of the original injury in January but failed to notify his employer on March 31, when his actual disability began. He also failed to obtain prior authorization from the employer for medical treatment. The claimant retained his own medical help and the ultimate result of his laminectomy was a fifteen percent partial permanent impairment. Bogdon filed a Form 9 application alleging that his injury had occurred on March 31, 1977. In the subsequent hearing, the employer's motion for a finding in its favor was granted by the single hearing member who found that "on the 31st day of May, [sic] 1977, plaintiff . . . did not sustain an accidental injury."[134] The full Industrial Board later adopted this decision without any additional reasons or find-

---

[129] *Id.*
[130] *Id.* at 370.
[131] *Id.* at 371.
[132] *Id.* at 369.
[133] 415 N.E.2d 767 (Ind. Ct. App. 1981).
[134] *Id.* at 769. *See also* note 140 *infra.*

ings of its own,[135] but after review and an order by the court of appeals,[136] the Board added an additional negative finding which stated that the claimant had failed to establish " 'by extrinsic evidence the existence of a fact to logically determine the date of alleged incident being January, 1977 or March 31, 1977, if one occurred.' "[137] The claimant sought review once more, claiming that the award of the Board was contrary to law.[138]

The court concluded that the hearing officer believed that the claimant may have been injured in January, 1977 but not on March 31, 1977.[139] The issues to be resolved were therefore whether adequate notice to the employer had been given and whether the claimant's Form 9 application was proper when it gave the date of injury as March 31, 1977.[140]

The court accepted the employer's assertion that Indiana Code section 22-3-3-1[141] requires either actual knowledge of the injury by the employer or written notice by the employee to the employer within thirty days of the injury.[142] The court continued by noting, however, that compensation is only barred if the employer was prejudiced by the lack of knowledge, and only then to the extent the employer was prejudiced.[143] The burden of proving prejudice is on the employer.[144] In this case the court found that there was no evidence in the record of prejudice to the employer.[145] Indeed, there was evidence in the record showing that the employer may have had actual or constructive knowledge of the injury.[146]

---

[135]415 N.E.2d at 769.

[136]In an unpublished opinion, the court of appeals initially directed the Board to file amended findings of fact and conclusions of law. 415 N.E.2d at 768.

[137]*Id.* at 769.

[138]*Id.*

[139]*Id.*

[140]*Id.* A third issue dealt with the effective date of a corrected award entered *sua sponte* by the single hearing member "in which he changed . . . the word *May* to *March* to reflect the proper date of the incident." *Id.* (emphasis in original). The court held that the correction should be treated like one made by a court. "A court's correction of an error *nunc pro tunc* relates back to the time of the original entry." *Id.* at 771. Because Bogdon had already filed an application for review of the original entry, no Form 16 application was required to preserve the corrected award as an issue for appeal and to give the court jurisdiction over the claim. *Id.* The resolution of this issue in *Bogdon* was analyzed in Rich v. Review Bd. of Ind. Employment Security Div., 419 N.E.2d 187, 189 (Ind. Ct. App. 1981).

[141]IND. CODE § 22-3-3-1 (1976).

[142]*Id.* at 769-70.

[143]*Id.*

[144]*Id.* at 770.

[145]*Id.*

[146]*Id.* at 769. "However, Ramada's housekeeper and other employees and staff knew of his injuries. . . . Ramada also paid him his sick pay and vacation pay." *Id.*

The employer also argued that the claimant's Form 9 application filed November 16, 1977 was defective because it set the effective date of injury as March 31, 1977 (rather than January, 1977) and refiling at this time would therefore be barred by the two year statute of limitations provided by Indiana Code section 22-3-3-3.[147] The employer was relying on the claimant's own evidence which set the original date of injury as January, 1977.[148] The court, citing *Hornbook-Price Co. v. Stewart*,[149] a factually similiar sixty-two year old case, held that "such a progressive injury is to be treated as one, the effective date being the point of disability."[150] Thus, the claimant's original Form 9 application dated March 31, 1977 was proper and filed well within the two year statute of limitations.[151]

2. Recurrent Injury After Leaving Employment.—In *E.F.P. Corp. v. Pendill*,[152] the claimant suffered a neck injury in the course of employment and received an award for temporary total disability. Two weeks after returning to work he was discharged for reasons unrelated to the injury. Eleven days later he received the first of several disability slips from a neurologist and his original doctor. Six weeks after the first slip was issued, the claimant filed for review of the original award "due to recurrence of injury." The Industrial Board awarded claimant new benefits from his original employer[153] and the award was affirmed by the court of appeals.[154]

The court ruled that while a new injury suffered by the claimant after leaving the original employer would not trigger liability under the Act,[155] the later recurrence of an old injury which had been received in the course of the original employment would support the award of additional benefits chargeable to the original employer.[156] The defendant had argued that a workers' compensation award constitutes a wage substitute that the worker would have been entitled to as an employee of the defendant company but for the injury. However, because an employee is no longer entitled to wages from the company after he leaves its employ, he should not be entitled to wage substitutes.[157] The court agreed that there was authority for

---

[147]*Id.* at 770-71 (citing IND. CODE § 22-3-3-3 (1976)).

[148]415 N.E.2d at 770.

[149]66 Ind. App. 400, 118 N.E. 315 (1918).

[150]415 N.E.2d at 771.

[151]*Id.*

[152]413 N.E.2d 279 (Ind. Ct. App. 1980), *transfer denied*, Apr. 20, 1981.

[153]*Id.* at 280.

[154]*Id.* at 281.

[155]*Id.* at 280 (quoting Walfcale v. Grush, 115 Ind. App. 155, 158, 57 N.E.2d 438, 439 (1944)).

[156]413 N.E.2d at 280.

[157]*Id.* at 280-81 (quoting Brief for Appellant at 7-8).

such a result, but only when the recurring injury is not the cause of the claimant's subsequent unemployment.[158] But where the old injury prevents a worker who wishes to work from earning wages from a new employer, wage substitutes chargeable to the original employer are in order.[159]

D. Arising Out Of and In The Course Of Employment

A heart attack suffered while at work will not entitle an employee to workers' compensation in the absence of a causal link between the attack and some "event or happening beyond the mere employment itself."[160] In *Harris v. Rainsoft of Allen County, Inc.*,[161] the court of appeals held that a heart attack suffered by a person with a pre-existing heart condition, is compensable when this causal link is the result of either physical *or* psychological stimulus.[162]

The claimant's decedent was the president and principal owner of Rainsoft, his employer. Earlier on the day of his fatal attack, he had witnessed and assisted at a fire in the building which also housed Rainsoft. Later that evening, he was roused from an after-dinner nap and told that Rainsoft itself was on fire. He rushed to the scene and found the building aflame. Moments later he collapsed and was immediately taken to the hospital where he died later that night.

The Industrial Board found that decedent's death "did not arise out of his employment."[163] The Board relied on *United States Steel Corp. v. Dykes*,[164] which was analyzed in *Douglas v. Warner Gear Division of Borg Warner Corp.*,[165] as requiring a showing that "the employment, or the conditions of the employment, must have been in some proximate way, accountable for, conducive to, or in aggravation of the hastening of the failing activity of the heart."[166] The Board further required that this causal link must be manifested in some sort of "*physical* exertion, over and above that generally required of the employee, or some *physical* impact or trauma which precipitates the heart attack in order to be compensable."[167]

The court found no Indiana cases which expressly required a

---

[158]413 N.E.2d at 281.

[159]*Id.*

[160]United States Steel Corp. v. Dykes, 238 Ind. 599, 613, 154 N.E.2d 111, 119 (1958).

[161]416 N.E.2d 1320 (Ind. Ct. App. 1981).

[162]*Id.* at 1324.

[163]*Id.* at 1322.

[164]238 Ind. 599, 154 N.E.2d 111 (1958).

[165]131 Ind. App. 664, 174 N.E.2d 584 (1961).

[166]416 N.E.2d at 1322 (quoting 131 Ind. App. at 672-73, 174 N.E.2d at 588).

[167]416 N.E.2d at 1323 (emphasis in original).

physical causal link although all Indiana cases permitting recovery had heretofore involved physical stimulus.[168] The court was able to find abundant authority from other jurisdictions, however, "for the proposition that a heart attack is compensable when induced by work-related unusual mental, emotional, or psychological stimulus and suffered by an employee with preexisting heart disease."[169] The court also quoted Professor Larson who has emphasized that "[t]he easiest type of case in which to connect the stimulus and the physical injury is that in which the precipitating event is sudden and the result immediate."[170] The court further noted that Indiana has awarded compensation in tort actions where emotional injuries arise out of physical trauma.[171] The one Indiana case in which compensation was denied when the stimulus leading to the heart attack was non-physical,[172] was distinguished by the *Rainsoft* court on the ground that that decision was simply based on what the earlier court held was its limited scope of judicial review, and not on any ruling by the court with respect to the principle of causative emotional trauma.[173]

E. Statutory Discrepancy in Benefit Schedules

In *Roberts v. Casting Service Corp.*,[174] the court of appeals reconciled an apparent conflict between one provision[175] of the Act which specified a formula for computing compensation benefits that resulted in an amount which exceeded the statutory ceiling mandated by Indiana Code section 22-3-3-22.[176] Chester Roberts was killed in the course of employment on November 3, 1969. His dependents and employer entered into an agreement which provided for a term

---

[168]*Id.*

[169]*Id. See, e.g.*, Little v. J. Korber & Co., 71 N.M. 294, 378 P.2d 119 (1973) (emotional upset); Pukaluk v. Insurance Co. of N. America, 7 A.D.2d 676, 179 N.Y.S.2d 173 (1958) (fright). *See generally* Larson, *The "Heart Cases" in Workmen's Compensation: An Analysis and Suggested Solution*, 65 MICH. L. REV. 441 (1967); Note, *Heart Injuries Under Workers' Compensation: Medical and Legal Considerations*, 14 SUFFOLK U.L. REV. 1365 (1980) (costs to employers in heart cases should be mitigated by application of waiver, apportionment, and second injury laws in order to avoid discrimination in the hiring of workers known to have pre-existing heart conditions).

[170]416 N.E.2d at 1323 (quoting 1 B. LARSON, WORKMEN'S COMPENSATION LAW §42.21 (1976) (citations omitted)).

[171]416 N.E.2d at 1324. *See, e.g.*, Olin Corp. v. Calloway, 160 Ind. App. 69, 309 N.E.2d 829 (1974); E.I. Du Pont De Nemours & Co. v. Green, 116 Ind. App. 283, 63 N.E.2d 547 (1945).

[172]*See* Campbell v. Colgate-Palmolive Co., 134 Ind. App. 45, 184 N.E.2d 160 (1962).

[173]416 N.E.2d at 1324.

[174]404 N.E.2d 1199 (Ind. Ct. App. 1980).

[175]IND. CODE § 22-3-3-17 (1976).

[176]*Id.* § 22-3-3-22(b) (Supp. 1981).

of five hundred weeks of compensation at a rate of $57 per week, or $28,500, based on a formula for calculating death benefits set out in section 22-3-3-17.[177] Elsewhere in the Act, however, section 22-3-3-22(b) states that the "maximum compensation exclusive of medical benefits which shall be paid for any injury under any provision of this law or any combination of provisions shall not exceed twenty-five thousand dollars ($25,000) in any case."[178] The Industrial Board ruled that the $25,000 ceiling applied, notwithstanding the existence of a formula which permitted a recovery in excess of that amount.[179]

In affirming this decision the court of appeals was "careful to point out that the appellant did not present the board with any issue of fact, nor did she question whether it was possible to agree to more than the $25,000 ceiling, nor does the record show that she raised any claim that the employer deceived her in any manner."[180] The sole issue was limited to a question of statutory interpretation. This dictum suggests that when an employer has expressly agreed to give claimant's dependents five hundred weeks of benefits at fifty-seven dollars per week, the employer *may* be bound to its promise. Or when the employer has deceived those dependents into believing that they are entitled to five hundred full weeks of benefits, the employer might be liable under a fraud theory for the full $28,000. Although conflict between these two provisions is limited to a narrow two-year (1969-1971) period and is therefore unlikely to have any appreciable future impact unless an injury from this period has not been fully settled, similar anomalies may arise as a result of future modifications to existing legislation. Employers and carriers who notify claimants and dependents regarding potential benefits, will be well advised to state in their notice that any compensation benefits to be dispensed or received are subject to all ceilings, limitations, and other provisions of the Act, or other operation of law.

F. Statutory Development

Under Indiana Code section 22-3-3-10(a), compensation for permanent impairment is based on sixty percent of the employee's "weekly wages, not to exceed one hundred twenty-five dollars ($125) average weekly wages" for the statutory periods assigned to the various

---

[177]IND. CODE § 22-3-3-17 (1976).

[178]*Id.* § 22-3-3-22(b) (Supp. 1981). This limitation applies to injury occurring between April 1, 1967 and July 1, 1971. *Id.*

[179]404 N.E.2d at 1200.

[180]*Id.*

scheduled injuries.[181] "Average weekly wages" are defined as "the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two (52) weeks immediately preceeding the date of injury, divided by fifty-two (52) . . . ."[182] Part-time workers would therefore be entitled under this formulation to benefits based on an average *partial* weekly wage.

During the 1981 legislative session Indiana Code section 22-3-6-1(c) was amended[183] to include vocational education students enrolled in approved "cooperative programs with employers" as defined in section 20-10.1-6-7.[184] These minor employees will now be considered full-time employees "for the purpose of computing compensation for permanent impairment"[185] and will have their average weekly wage calculated by multiplying "(A) The student employee's hourly wage rate . . . by (B) forty (40) hours," but only for the purpose of calculating permanent impairment awards.[186]

This new formula creates an increased actuarial burden for employers employing vocational education students. It should be noted, however, that Indiana Code section 20-10.1-6-8 appears to exempt such students from additional benefits "otherwise payable as a result of being under seventeen (17) years of age under the definition of a minor in IC 22-3-6-1."[187] The additional benefits referred to are probably the punitive "double compensation" provisions of section 22-3-6-1(c) which directly assesses an additional amount equal to the regular compensation award in the event of injury against the employer (rather than the insurance carrier) who employs a minor under sixteen years of age "in violation of the child labor laws of this state."[188] Without this exemption, some employers under the "cooperative program" might have found themselves more frequently liable.

---

[181]IND. CODE § 22-3-3-10(a) (Supp. 1981).
[182]*Id.* § 22-3-6-1(d).
[183]Act of April 27, 1981, P.L. 199, 1981 Ind. Acts 1548 (1981).
[184]IND. CODE § 20-10.1-6-7 (Supp. 1981).
[185]*Id.* § 22-3-3-10.
[186]*Id.* § 22-3-6-1(d)(4).
[187]*Id.* § 20-10.1-6-8.
[188]*Id.* § 22-3-6-1(c)(2).

INDIANA CONTINUING LEGAL EDUCATION FORUM PRACTICE MANUALS

The ICLEF Practice Manual library is designed to meet the needs of Indiana lawyers.

AUTHORS: Each practice manual is prepared by Indiana lawyers and law professors with extensive experience in their subject area. The result is a practice text of extraordinary usefulness and reliability.

Readers are able to develop a wider perspective of the law because each manual is a composite of the best writings pertaining to specific legal areas.

FEATURES: The manuals contain procedural and fact-gathering checklists, sample forms with a wide array of alternative clauses and tax saving suggestions.

ATTRACTIVELY BOUND: Each handsome ICLEF manual has been prepared and published in conjunction with a previously held popular seminar by its faculty. The current library of 34 titles is sure to benefit some aspect of your practice.

FOR A COMPLETE TREATISE on a particular area of the law, the practice manual and seminar audio cassettes are available for sale at a reduced package price.

FOR A DETAILED CATALOGUE listing the current ICLEF titles contact:

Indiana Continuing Legal Education Forum
230 E. Ohio, Suite 202
Indianapolis, Indiana 46204
(317) 264-3939

The definitive text:

Civil Rights Legislation

by

THEODORE EISENBERG

This important segment of public law now may be taught in an organized and coherent fashion, with a casebook which includes all important substantive legislation and Court decisions through the Fall, 1980 term.

As well as providing an historical perspective to civil rights legislation, the text focuses on the crucial and fundamental issues in the field:

- Extensive coverage of issues under section 1983
- Damages and injunctive relief
- Discrimination in housing and employment
- Supreme Court interpretations of federal statutes
- The relationship between state and federal courts
- The Civil Rights Act of 1964
- Individual and governmental defenses
- Legislative immunity
- The liability of municipalities
- Jurisdictional problems
- Remedies for constitutional rights violations
- Exhaustion and Abstention
- Issues arising under section 1982
- For handy reference, a complete text of the Constitution is provided

hardbound edition
appx. 1000 pages
© 1981 Bobbs-Merrill

MICHIE
BOBBS-MERRILL
P.O. Box 7587
Charlottesville, Va. 22906

$25.00*

*plus shipping, handling and sales tax where applicable